

Mid-Mountain Foods, Inc. and United Food and Commercial Workers International Union, Local 400, AFL-CIO, CLC and John C. Widener and International Brotherhood of Teamsters, AFL-CIO. Cases 11-CA-17354, 11-CA-17379, 11-CA-17398, 11-CA-17414, 11-CA-17479, and 11-CA-17496-2

September 21, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On August 5, 1998, Administrative Law Judge Pargen Robertson issued the attached decision. The Respondent and Charging Party Local 400 each filed exceptions and a supporting brief. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² as

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We also find without merit the Respondent's allegations of bias on the part of the judge. On our full consideration of the record, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias in his credibility resolutions, analysis, or discussion of the evidence.

We deny the Respondent's motion to reopen the record and introduce new evidence. The evidence sought to be adduced by the Respondent, even if credited, would not require a different result. Accordingly, the Respondent has not shown the "extraordinary circumstances" required under Sec. 102.48(d)(1) of the Board's Rules and Regulations to warrant a reopening of the record.

² In adopting the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by threats of termination and of futility in selecting the Union, we do not rely on his finding that employee John Widener's comments about the Respondent's perishable drivers constituted protected concerted activity. We note that the judge's recommended Order does not advert to this finding.

In adopting the judge's animus findings, we note that in another recent case the Respondent was found to have violated Sec. 8(a)(1) of the Act by unlawfully interrogating employees, threatening stricter enforcement of plant rules, threatening discharge and job loss, and by removing pronoun literature from employee break areas. The Respondent was also found to have violated Sec. 8(a)(3) of the Act by giving a written warning to an employee (Steven Warner, also a discriminatee in the instant case) who missed work when subpoenaed to testify at a Board representation hearing. Further, an August 1996 election was set aside because of the Respondent's misconduct. *Mid-Mountain Foods, (Mid-Mountain I)*, 332 NLRB 19 (2000). We also note that the events of the instant case occurred not long after those in *Mid-Mountain I*, and

modified below and to adopt the recommended Order as modified.

1. The judge found that the Respondent violated Section 8(a)(1) and (3) of the Act by suspending Tony Orfield with a final warning and by later discharging him. The Respondent has excepted to this finding. We find merit in this exception and, for the reasons stated below, we reverse the judge's finding as to Orfield.³ We assume *arguendo* that the judge correctly found that a prima facie case was established, but we conclude that the Respondent successfully rebutted it.

The judge rejected the Respondent's contention that, irrespective of order selector Orfield's union activities, it would have taken the same actions against him because he twice negligently damaged its property in disregard of established safety practices.

The judge noted that Orfield had two accidents, one in October 1996 and the other in January 1997. In the first one, Orfield backed his SGX machine (a machine designed to lift one or two pallets several inches off the floor and transport them) through a curtained door, striking the leg of a rack and causing tons of butter to fall from the rack and cover his machine. In the second one, Orfield tried to drive his SGX through closing doors without first pulling the cord that would open them, resulting in damage to the doors. After the first incident, Orfield received a final warning and a suspension. Orfield was discharged after the second incident.

The judge apparently rejected the Respondent's argument largely because he found that the Respondent's reliance on the amount of damage done in the October 1996 incident was a pretextual afterthought, as demonstrated by the different estimates of damage its witnesses made at the hearing. However, Supervisor Randy Noonchester, who conducted the primary investigation, estimated the damage at \$4700. In any event, the fact that different supervisors may have estimated the damage differently does not establish that the matter was never investigated or that the Respondent's reliance on this factor was pretextual.

Further, the final warning given to Orfield in October 1996 stated that any further improper conduct would result in termination. (Indeed, under the Respondent's policy, it could have terminated Orfield after the *first* accident, but chose not to do so.) Orfield, who signed the final warning, knew this, as did his coworker Jerry Price, who, according to the testimony of Supervisor Trey Browning, asked Browning not to write up Orfield

that the same people were involved in several violations found in both cases.

³ Chairman Truesdale and Member Hurtgen join in this section of the decision. Member Fox has dissented.

for the second incident because it would cost Orfield his job.

Nor was Orfield treated disparately. Employee Ron Ryan was suspended and received a final warning after an accident similar to Orfield's October accident, and the Respondent terminated Johnny Coalson when he violated work rules after receiving a final warning. Even assuming that the judge correctly characterized the January accident as "minor," the fact remains that Orfield was involved in a second accident 3 months after receiving his final warning, which stated that another infraction would result in his dismissal. In these circumstances, we find that the Respondent has shown that it would have warned, suspended, and discharged Orfield even in the absence of his union activities. We therefore conclude that the Respondent's actions were not unlawful.

Contrary to our dissenting colleague, we do not find that the Respondent has shown only that it might have punished Orfield in the absence of his protected activities. We emphasize the significant cost to the Respondent of Orfield's October 1996 accident, as estimated by the supervisor who conducted the primary investigation of the damage, as well as the suspension and final warning given to employee Ryan for a similar accident. Contrary to the assertion of our dissenting colleague, Respondent investigated the accident prior to the discipline that was imposed 2 days later. Although the precise amount of damage had not yet been computed at that time, it was at least clear that the damage was substantial. We recognize that other employees may have received lesser punishments for other accidents. However, without more, this does not establish disparate treatment, particularly in light of the seriousness of Orfield's accident.

2. Contrary to our dissenting colleague, we agree with the judge that the Respondent unlawfully terminated Ronnie Brooks when it refused to reinstate him following a disability and unlawfully issued a written warning to Larry Nunley.⁴

Brooks had been employed by the Respondent for over 10 years when he went out on a medical leave on August 5, 1996. By letter dated January 13, 1997, the Respondent informed Brooks that he would reach his 183-day maximum allowable disability leave on February 11 and advised him that he would be terminated if he did not return to work by that date *or request an extension*. Presumably in response to the Respondent's letter, Brooks received his physician's clearance to return to work February 24 and, on February 5, forwarded the clearance to

the Respondent along with his request for a 13-day extension of his disability leave.

The Respondent received Brooks' extension request on the same date that the Respondent reviewed the union authorization cards, one of which Brooks had signed before he went on medical leave. A few days later, the Respondent learned that Brooks was a potential witness for the General Counsel in an upcoming hearing. Within a few days of that, on February 14, the Respondent denied Brooks' request for an extension and terminated him.

Although our dissenting colleague assumes that the General Counsel has demonstrated that Brooks' protected conduct was a motivating factor in the Respondent's decision to deny his request for an extension and discharge him,⁵ he finds that the Respondent carried its burden of proving that its decision would have been the same even in the absence of that protected conduct. According to our colleague, the Respondent carried its burden by demonstrating that it has always denied requests for such extensions of disability submitted in the past and reserved the right to do so in its letter to Brooks. We disagree.

As the judge points out, Brooks requested an extension of his disability leave from February 11 to 24—only 13 days. All of the past requests that were denied by the Respondent sought extensions of unlimited duration. Contrary to our colleague, the Respondent demonstrated only that it had a practice of denying requests that were for unlimited duration, not a practice of denying requests for any extension at all. The Respondent also fails to explain why, if it had a practice of denying all extension requests, it invited Brooks to submit a request for an extension in the first place, knowing that the request would be summarily denied.⁶ Finally, the Respondent does not explain why, when Brooks submitted his request for an extension on February 5, the Respondent waited until February 14, three days *after* the 183-day disability period had expired, to deny the request, thus depriving Brooks of an opportunity to seek clearance to return to work before the time had expired.

The only event intervening between the Respondent's January 13 invitation to Brooks to apply for an extension and his February 14 termination is the Respondent's discovery of his involvement in union activity. To establish its affirmative defense under *Wright Line*, the Respondent was required to show that even in the absence of

⁴ Chairman Truesdale and Member Fox join in this section of the decision. Member Hurtgen has dissented.

⁵ *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

⁶ Although our colleague relies on the fact that the Respondent reserved the right to deny Brooks' request, it gave no indication that it would do so.

this discovery, it would have discharged Brooks as it did, not merely that it might have done so or that it had the right to do so. *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 31 (D.C. Cir. 1998). Given the timing of the discharge, the inconsistency between inviting a request for an extension and then firing Brooks when he made one, and the failure to show a pattern of rejecting similar limited-duration extension requests in the past, we find that the Respondent failed to prove its defense. Accordingly, we find that it unlawfully discharged Brooks in retaliation for his union activity.

We also find that the Respondent unlawfully disciplined Nunley for a misshipment in February 1997. Here again, our dissenting colleague assumes that the General Counsel has shown that Nunley's union activity was a motivating factor in the Respondent's decision to discipline him for the error but finds that the Respondent has satisfactorily met its burden of rebuttal by showing that it has issued similar disciplinary warnings in the past. In fact, the Respondent concedes that it has *not* invariably issued written warnings for similar infractions. As noted above, under the *Wright Line* test, it is incumbent on the Respondent to demonstrate not only that it has sometimes issued similar warnings in the past but that it *would have* issued a warning to Nunley for his conduct without regard to his union activity. The Respondent has failed to make this crucial showing. Accordingly, in agreement with the judge, we find that the record establishes that the Respondent's issuance of a warning to Nunley violated Section 8(a)(3) and (1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Mid-Mountain Foods, Inc., Abingdon, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 2(a) and (b) and reletter the subsequent paragraphs.

"(a) Within 14 days from the date of this Order, offer immediate and full reinstatement to John Widener, Randall Perdue, and Ronnie G. Brooks to their former positions or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.

"(b) Make John Wilder, Randall Perdue, and Ronnie G. Brooks whole for any loss of earnings and other benefits suffered as a result of the discrimination against them plus interest, in the manner set forth in the remedy section of the judge's decision.

"(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful unexcused absence, verbal and written warnings, suspensions and discharges of John Widener, Randall Perdue, Daniel Hounshell, Steve Warner, Coy Wolfe Jr., Ronnie G. Brooks, and Larry Nunley, and within 3 days thereafter notify those employees in writing that this has been done and that the warnings and discharges will not be used against any of them in any way."

2. Substitute the attached notice for that of the administrative law judge.

MEMBER FOX, dissenting in part.

I join Chairman Truesdale in all respects except that, contrary to his and Member Hurtgen's position, I would adopt the judge's findings that (1) the Respondent violated Section 8(a)(3) and (1) when it issued a 3-day suspension and "final warning" to employee Tony Orfield in October 1996 and, (2) because that unlawful warning was admittedly a predicate for the Respondent's 1997 discharge of Orfield, the Respondent violated Section 8(a)(3) and (1) when it discharged him.

As the judge found, there was abundant evidence that in October 1996, Orfield was known to the Respondent as an outspoken union supporter. During an organizing campaign leading up to a representation election in August 1996, Orfield had recruited 20 out of 35 employees in two different departments to sign authorization cards, and, while wearing a shirt with the Union's logo on it, had explained to one of the Respondent's supervisors that he would not attend a company meeting because he did not wish "to go listen to the Company's lies." Not long thereafter, Warehouse Manager Wes Basham, who was the primary decisionmaker in the October discipline, told Orfield, "I'm glad you showed your true colors," and, after asserting that employees would need permission to go to the bathroom if the Union got in, added: "Mr. Orfield, you're a young man. You just built a new house, got a beautiful wife, and two beautiful kids, and [] I'd hate to see you lose all that." The Union lost the August election, but challenged the election through objections, which were pending in October 1996.¹

In October, while backing a forklift truck through a warehouse door, Orfield accidentally struck the leg of a rack containing pallets of butter, and the butter was damaged when the rack collapsed. Two days later he was told by Warehouse Manager Basham and a supervisor that he was being given a 3-day suspension and "final warning" for the accident. Under the terms of the warn-

¹ I take administrative notice of the Union's loss of the election and filing of objections in Board Case 11-RC-6147.

ing, Orfield would be discharged if had a further accident for which he was at fault.

Given the Respondent's knowledge of Orfield's union activity, the apparent hostility expressed to it by Manager Basham, and Basham's issuance of discipline to Orfield at a time while the Union was challenging the election results, I agree with the judge that the General Counsel has established that Orfield's union activity was a motivating factor in the decision to issue the October discipline. (I note that my colleagues assume *arguendo* that the General Counsel established this "prima facie case" of discrimination.) Thus, under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), the burden shifts to the Respondent to show that it would have disciplined Orfield in that fashion even in the absence of his union activity.

The Respondent sought to carry this burden by pointing to its discipline of employee Ron Ryan, who had received a final warning for an accident, and employee Johnnie Coalson, who had been discharged for an accident after he had received a final warning. As the judge found, however, Coalson had not merely had an accident, but had fallen asleep on his machine and had failed to report the ensuing accident. As for Ryan, even assuming his accident was comparable to Orfield's October incident, the Respondent's discipline of him does not establish that it would have issued the suspension and warning to Orfield even in the absence of his protected activities. As the judge pointed out, the evidence showed numerous other instances of employees who had had accidents (e.g., hitting a door with a forklift, tearing an "eye wash station" off the wall, knocking a heater down from above a freezer door) and who merely received "verbal" warnings or were told to "be more careful." The judge also reasonably rejected the Respondent's attempt to characterize Orfield's October accident as especially serious because of the amount of damage done and because it represented "misuse of equipment." As the judge pointed out, all of the recorded accidents, including those for which mere oral warnings were given, could be said to have involved misuse of equipment. As for the amount of damage, he noted that the amount of damage had apparently not been investigated and quantified at the time of the final warning, and that damage estimates given by the Respondent's witnesses at the hearing varied widely. Accordingly, he concluded, the Respondent's claim that it relied on the seriousness of the damage was an "afterthought" to justify action that had actually been taken for unlawful motives.

The record thus establishes at most that, even absent Orfield's protected activities, the Respondent *might* have punished Orfield in October 1996, as it had Ryan, rather

than imposing the lesser measures taken against other employees for involvement in accidents. This is not the same as establishing by a preponderance of the evidence that it *would* have done so—the burden that the Respondent must meet to establish its affirmative defense under *Wright Line*. *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 31 (D.C. Cir. 1998).

Accordingly, I would find that the suspension and final warning issued to Orfield in October 1996 violated Section 8(a)(3) and (1), and, as a result, his discharge in 1997, predicated in part on that warning, was also unlawful.

MEMBER HURTGEN, dissenting in part.

Unlike my colleagues, I conclude that the Respondent acted lawfully as to Ronnie G. Brooks and Larry Nunley. In each instance, I assume *arguendo* that the judge correctly found that a prima facie case was established, but I conclude that the Respondent successfully rebutted it.

Brooks

The judge rejected the Respondent's argument that it terminated Brooks because he was absent from work for more than 183 days, the maximum number permitted under the Respondent's policy. He noted that Brooks made a timely request for an extension of the period, and that Respondent refused that request. The judge also noted the Respondent's evidence that it has denied comparable requests for extensions of sick leave. However, he distinguished these on the basis that in those cases the employees requested indefinite extensions, whereas Brooks sought only 13 days of additional leave.

This reasoning misconstrues the nature of the Respondent's burden of rebuttal. In response to the General Counsel's prima facie case that Brooks was unlawfully terminated, the Respondent has come forward with a lawful and credible explanation of its action, based on a policy of which Brooks was aware. That explanation makes it clear that Brooks would have been terminated even if he had not engaged in protected activity. More particularly, the Respondent sent Brooks a letter about 1 month before the 183-day deadline, stating that he would be terminated on February 11, 1997, if he had not returned to work or requested an extension by that date. The Respondent further wrote Brooks that the decision to grant or deny a request for an extension was within its discretion. In addition, the Respondent's employee handbook, which Brooks had received, states that there is no guarantee of reemployment upon an employee's return to work from disability leave and that, if an employee is unable to return to work after at least 183 days, he will be terminated from the Respondent's active pay-

roll. Brooks acknowledged that he was aware of these policies.

Concededly, the Respondent offered Brooks an opportunity to *request* an extension of the leave period. However, there was no guarantee that the request would be granted. The past practice in this respect is shown by the Respondent's uncontradicted evidence that it had denied the requests of other employees seeking extensions beyond the 183-day leave period. Indeed, there is no evidence that such a request has ever been granted. The fact that these denied requests were for indefinite extensions, rather than for a set period, does not render them irrelevant. There is no evidence that the Respondent, in the past, has drawn a distinction between indefinite extensions and limited extensions. The distinction is that of my colleagues, not that of the Respondent.

Finally, there is nothing suspicious or abnormal about the timing of the Respondent's action. Brooks made the request on February 5 and, perforce, the Respondent made the decision shortly thereafter. In sum, the critical facts are: the Respondent has the 183-day rule (of which Brooks had notice); it has denied the requests of other employees who requested extensions; and there is no evidence that the rule was disparately enforced. Thus, there is no evidence or claim that employees who were not union supporters were granted extensions for specified periods of time. Accordingly, I find that the Respondent has shown that it would have discharged Brooks even in the absence of his union activities. I would therefore dismiss this 8(a)(3) allegation.

Nunley

The judge rejected the Respondent's contention that it properly warned Nunley for misshipping product on February 27, 1997. The judge apparently rested this conclusion on his findings that: Nunley acted as a representative at a Board hearing for 2 weeks during February 1997, shortly before the misshipment; unlike employee Eugene Osborne, Nunley received a written (as opposed to oral) warning for his misshipment; unlike Osborne, Nunley was not a habitual misshipper, having committed no infractions before February 27; and Nunley's offenses were less serious and numerous than those of employee Craig Price, who was warned and later discharged after charges were filed alleging that Nunley and Osborne had been disciplined unlawfully. My colleagues agree with the judge's analysis. I disagree.

The first of the judge's findings, concerning Nunley's activity at the hearing, pertains to the *prima facie* case, which, as noted above, I assume *arguendo* to have been established. With respect to the alleged disparity between the treatment of Nunley and that of Osborne, I cannot accept the proposition that Nunley was treated

more harshly than Osborne because of Nunley's union activities. The fact is that both employees were known union activists.

Nor do I find that the judge's comparison of the treatment of Nunley and Price supports finding a violation. On the contrary, it is clear that Nunley misshipped the product in question, and that the Respondent routinely (though not invariably) warns employees who do so. Indeed, each of Price's misshipments resulted in a warning and he was eventually terminated because there were so many of them. None of these facts gives rise to the inference that Nunley was treated disparately. Accordingly, I conclude that the Respondent lawfully warned him.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten our employees with discharge or with the discharge of other employees because of their union activity.

WE WILL NOT threaten our employees with the futility of selecting a union including International Brotherhood of Teamsters, AFL-CIO; United Food and Commercial Workers International Union, Local 400, AFL-CIO, CLC; or any other labor organization.

WE WILL NOT issue unexcused absences, verbal and written warnings, suspensions and discharges, or otherwise discriminate against any of our employees for supporting International Brotherhood of Teamsters, AFL-CIO; United Food and Commercial Workers International Union, Local 400, AFL-CIO, CLC; or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer John Widener, Randall Perdue, and Ronnie G. Brooks full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make John Widener, Randall Perdue, and Ronnie G. Brooks whole for any loss of earnings and other benefits resulting from our illegal actions against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful unexcused absence, verbal and written warnings, suspensions and discharges of John Widener, Randall Perdue, Daniel Hounshell, Steve Warner, Coy Wolfe Jr., Ronnie G. Brooks, and Larry Nunley and, WE WILL, within 3 days thereafter, notify Widener, Perdue, Hounshell, Warner, Wolfe, Brooks, and Nunley in writing that this has been done and that the absence, warnings, suspensions, and discharges will not be used against any of them in any way.

MID-MOUNTAIN FOODS, INC.

Donald Gattalaro, Esq., for the General Counsel.

Ronald I. Tisch, Esq., of Washington, D.C. and *Mark M. Lawson, Esq.*, of Bristol, Virginia, for the Respondent.

George Wiszynski, Esq., of Washington, D.C., for UFCW.

DECISION

PARGEN ROBERTSON, Administrative Law Judge. This hearing was held on November 5 through 7, 1997, and April 6 through 9, 1998, in Bristol, Virginia. The charges were filed on various dates beginning on February 6, 1997. A consolidated complaint issued on August 28, 1997. This decision is based on review of the entire record and briefs filed by the Respondent and General Counsel.

I. JURISDICTION

Respondent admitted that it is a Delaware corporation with facilities located in Abingdon, Virginia, where it is engaged in the cooperative wholesale grocery warehouse and distribution business. It admitted that during the past 12 months at its Abingdon, Virginia facilities, it purchased and received goods and materials valued in excess of \$50,000, and it sold and shipped products valued in excess of \$50,000, directly from and to points outside Virginia. It admitted that it has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act (the Act), at material times.

II. LABOR ORGANIZATION

The record shows that United Food and Commercial Workers International Union, Local 400, AFL-CIO, CLC (UFCW) and International Brotherhood of Teamsters, AFL-CIO (Team-

sters) have been labor organizations within the meaning of Section 2(5) of the Act, at all material times.

III. THE UNFAIR LABOR PRACTICE ALLEGATIONS

The complaint alleges violations of Section 8(a)(1), (3), and (4) of the Act including threats, written warnings, unexcused absence, suspensions, and discharges. A substantial portion of the evidence relates to more than one allegation. For that reason I have included several allegations under one heading in many of the matters below.

Threat of Termination; Threat of Futility of Selecting the Union; Told Employees that Others would be Terminated because of the Union; Gil Johnson; Threaten Futility of Selecting a Union; John Dollar; Suspensions; Discharges; and John Widener

John Widener worked for Respondent for 8-1/2 years. He was a truckdriver. Widener participated in the Teamsters organizing activities from October 1996. Respondent posted a letter from the Teamsters in December 1996. Widener was named in that letter as being on the Teamsters organizing committee (GC Exh. 6).

Widener testified that he met with John Dollar and Jesse Lewis in Lewis' office on April 7, 1997. John Dollar commented there would never be a union at Mid-Mountain Food. He said that the union was no good for the people.

Respondent's president, Jesse Lewis, admitted that John Widener supported the Teamsters and that Widener asked to see him. Lewis recalled meeting with Widener during March 1997.¹ Widener was off on disability leave at that time. Lewis asked John Dollar to be in the meeting. Among other matters John Widener talked about perishable drivers. Widener said he did not believe it was right that perishable drivers made 20 cents an hour more than dry drivers. Widener also suggested that perishable drivers had too much time to make their routes and that their time should be reduced. Lewis replied that the routes had been timed and that Widener could bid on a perishable route if he desired. Lewis denied that John Dollar said that the union was no good, or was bad for the people or there would never be a union at Mid-Mountain.

John Dollar no longer works for Respondent. He was formerly the director of operations and human resources. He recalled meeting with Jesse Lewis and John Widener and that Widener talked about the perishable drivers having too much time on their runs. Dollar testified there was no discussion about unions. He denied that he said there would never be a union at Mid-Mountain.

Widener was suspended on April 10 allegedly for having failed to report an accident. He noticed damage on truck 3034 on April 9, including cracks on the fender, abrasions on the bumper, and scuffmarks but did not report it because it was old

¹ Carolyn Henderson, the former secretary in human resources, testified that John Widener received disability benefits from February 7 until around March 18, 1997 (see R. Exhs. 90(a)-(f)). During March while he was in to pick up his disability check, Widener told Henderson that he wanted to see Jesse Lewis. Lewis came down and he and Widener left the office together.

damage. He had seen similar damage to other trucks and had not reported "old" damage.

Robert Nudder drives a truck in perishable. As a perishable driver he usually left around the time the dry drivers were returning from their runs. Nudder noticed John Widener drive in as Nudder was waiting to punch in. When Nudder walked out he noticed a split on the fender of one of Respondent's trucks. He was not aware of whether it was the truck John Widener had been driving. The truck had been pulled around for fueling but the cab had not been lifted. Nudder mentioned the split fender to fueler Troy Gobble.

Troy Gobble noticed damage to tractor 3034 after pulling it to the fuel station. The damage was to the fender well on the passenger side. Gobble reported the damage to dispatcher Ray Poston. Gobble was told to park tractor 3034 so that Bill Bass and Mike Tate could examine it and to write out what had occurred. Dispatcher Ray Poston testified that Troy Gobble reported damage to a tractor driven by John Widener. Poston examined the tractor and took pictures of the damage. He filed a daily report mentioning the damage.

William Bass is Respondent's transportation manager. Bass testified that he received a report of damage to truck 3034 from Ray Poston on April 10, 1997. The report included a picture of the damage. Bass checked the truck and noticed a scratch from the signal light back about half way of the fender. At that point there was a break in the fender. The signal light was cracked. Bass checked the condition reports and saw that Widener was the last driver of truck 3034 and had reported no damage. Bass told Supervisor Steve Spence to make a followup investigation on the incident. Spence testified about his observation of the damage to truck 3034.

Bass and Steve Spence spoke to Widener the next day. Bass asked Widener if he had damaged truck 3034. Widener replied that if he had damaged the truck it would only have been an accident and to just fill out an accident report. Bill Bass told Widener that he was suspended until the incident could be investigated. Spence recalled that Widener said that he did not recall damaging truck 3034 but that he could have damaged it. Widener said if he did damage the truck it was an accident and to just write him up for an accident. Bass testified that Spence reported to him that he had talked with the driver that drove 3034 before Widener and learned that the driver, Vance Rust, said the truck was not damaged when he turned it in. Spence testified that he also talked with Troy Gobble who fueled the truck when Widener returned and David Sanders who fueled the truck before Widener went out. The truck was not damaged when Widener went out and it was damaged when he returned. Driver Vance Rust testified that he told Bill Bass there was no damage to truck 3034 when he last drove it. Rust did not talk to Steve Spence about the damage.

Robert Nudder recalled being asked by Bill Bass and Steve Spence if he had seen anything regarding damage to truck 3034. Nudder noticed the damage to 3034 as he was leaving on his run. Ernest Barger testified that he works for TMI and performs maintenance on Respondent's trucks. In April 1997, Bill Bass asked him to examine damage to tractor 3034. He recalled damage to the fender and he identified pictures of that damage (R. Exh. 76-d). Michael Brooks is the owner of a body repair

company in Bristol. He has done repair work on Respondent's trucks. Brooks has examined pictures of the damage to tractor 3034. He did not examine the tractor but was asked to estimate the cost of repair.

William Bass met again with Widener on April 15 and informed him of the results of the investigation. Widener denied that he had damaged the truck. Bass told Widener that he would get back to him when a decision was made. At a subsequent meeting 2 days later, Bass told Widener that he was terminated. Widener was discharged for failure to report an accident (R. Exh. 75). Bass admitted that he knew that Widener supported the Teamsters. Spence testified that Respondent has fired other employees for failure to report accidents including David Ramey and Wayne Spence. Ramey was fired before and Spence was fired after the discharge of Widener.

John Widener testified that Bill Bass told him that he was suspended on April 10. Bass told him that he had cracked a fender on tractor 3034 and that the damage had been discovered about 5 minutes after Widener clocked out. Bass phoned Widener the following Friday and told him to report to the front office. Bass and Steve Spence met with Widener and told him that he was discharged because of the April 9 accident. Widener denied that he had an accident on April 9.

Ronnie Kell testified that he spoke with Supervisors Gil Johnson and Mike Tate about John Widener on April 7, 1997. Gil Johnson said that he was going to let the drivers know what kind of man John Widener was. Johnson told Kell to tell Widener that "if he wanted to stir up some stink, that stink was here to stir up and he was the stink, that [Widener's] days were numbered and they were going to weed out the troublemakers." Johnson and Tate told Kell they would do what they could to save Kell's job. Kell asked Johnson if he had not been a supporter of the union at one time. Johnson replied that he had been. A few days before the April 7 conversation, Gil Johnson told Kell that "Mister Redneck (John Widener) went down and told them that he could run any perishable or produce driver's run two hours quicker than any one of them could and this and that, just stirring up trouble."

Kell inspected truck 3034 after he heard that John Widener had been suspended on April 10, 1997. Kell noticed a 4" to 6" crack in the right fender and it looked to him like someone had wiped a substance on the steering tire on the right side to make it look like the tire had been curbed. Kell testified the crack appeared to be caused by stress from normal wear and tear. He testified that the fuelers occasionally pull the hood up from the rear by grabbing the fender and that action tends to contribute to stress fractures in the fender.

When Fred Badger came in on April 7, there were rumors that Johnson and Tate were saying that John Widener had demanded that something be done about the produce and milk drivers. Widener had returned to work from surgery on April 6. Badger suggested confronting Widener to determine what was actually happening. In an April 7, 1997, meeting with Johnson and Mike Tate, Gil Johnson told Badger that maybe Badger was not happy with his job and that Gil Johnson wanted to

know who had been calling Jesse Lewis a liar.² Johnson said that drivers had been going up and down the road cussing on their CB about Mid-Mountain. Badger told Johnson that the drivers thought that Johnson was the one starting these rumors. Johnson said that he was and that he was “going to expose John Widener to be the loud mouth trouble maker that he is,” and that the president of the company gave him authority to do so. He said that Widener’s days here were numbered and so was “a group of other people.” John Widener was fired some 4 or 5 days later.

Road Supervisor Gilbert Johnson denied telling an employee to say goodbye to Widener. He denied telling anyone around April 7 that union supporters would be terminated. Johnson testified that employee Tom Colley came to him and said he had a heated discussion regarding John Widener saying the perishable drivers had too much time on their runs. Nothing was said about the Union. Johnson and Assistant Transportation Manager Mike Tate decided to ask Ron Kell and Fred Badger about the problem.³ They met separately with Kell and Badger. Johnson denied saying that Widener was a loud-mouthed troublemaker. He denied telling anyone that Widener’s days were numbered.

Assistant Transportation Manager Mike Tate testified that Tom Colley came to him and Gil Johnson about an argument in the breakroom. He and Johnson called in Colley, Ron Kell, and Fred Badger and talked to each separately. Tate denied that Johnson said that John Widener was a troublemaker and a loudmouth. Widener was called “red-neck” during the meeting. That is his “CB” nickname. Johnson did not say that union supporters would be terminated. Tate admitted knowing that Widener, Kell, and Badger all supported the Teamsters. They were named on a list of Teamsters supporters that was received as General Counsel’s Exhibit 6. Tate admitted that he knew of Widener’s Teamsters activity before his conversations with Kell and Badger.

Donnie Ross is a truckdriver. He has worked for Respondent for 5 years. Around April 12, after hearing of Widener’s alleged accident in truck 3034, Ross reported to Supervisor Bill Blass that a crack in the fender had been apparent when he drove that truck on April 5 and 6. He told Bass on April 12, that the crack was only a little bit bigger than it had been on April 6. Blass told Ross that Widener had scuffed the tire. Ross checked the tire. He testified there was something that tasted like “antifreeze or something” on the tire. Ross told Bass that he had seen the fuelers pick up the hoods of the trucks by the fenders.

Greg Davis drove truck 3034 on March 2, 18, and 19, 1997. The right fender had an approximately 4-inch straight crack. Davis did not report the crack because he felt it was normal

wear and tear. After Widener was discharged Davis looked at the fender and saw that the same crack had increased to 6 to 8 inches long. He testified that the crack had been pulled out because there were no scratches around it to indicate a blow to the fender. He saw a liquid such as antifreeze or windshield washer fluid on the tire. Davis testified that several of Respondent’s tractors have cracks similar to the one on 3034.

Jimmy Anderson drove truck 3034 the day before Widener was discharged. Anderson did not recall whether he examined the fender that day.

Road Supervisor Gilbert Johnson testified that Jimmy Anderson told him that he had driven truck 3034 a day or two before Widener and he had not seen any damage to the fender or tire. Anderson said that he could be mistaken but he did not recall seeing anything.

Findings

Credibility

I have considered the credibility of John Widener, Jesse Lewis, John Dollar, Robert Nudder, Troy Gobble, Ray Poston, Bill Bass, Steve Spence, Vance Rust, Ernest Barger, Michael Brooks, Ronnie Kell, Fred Badger, Gilbert Johnson, Mike Tate, Donnie Ross, Greg Davis, and Jimmy Anderson in view of their demeanor and the full record. I was especially impressed with the testimony of Ronnie Kell and Fred Badger. Respondent currently employs Kell and Badger. Kell and Badger met with Gil Johnson and Mike Tate in separate meetings on the same day. It was obvious from their testimony that Johnson and Tate were addressing the same issue in each meeting and that issue was a timely one in view of other evidence showing that John Widener had met with Company President Jesse Lewis and expressed concern with the different treatment afforded perishable and denied dry drivers. I also credit the testimony of John Widener. I do not credit the denials by John Dollar and Jesse Lewis, that Dollar said that the Union was no good for the people and that it would never get in at Mid-Mountain.

I was also impressed with the demeanor and testimony of Greg Davis and Donnie Ross. Both remain employed by Respondent. The Board has consistently been impressed by testimony of current employees where it is shown those employees demonstrated good demeanor and appeared to testify truthfully.

William Bass appeared to exaggerate his testimony. His testimony showed more damage to tractor 3034 than that of earlier reports. For example, Respondent’s written reports regarding damage to tractor 3034 do not mention any damage to the tire. Bass told Donnie Ross that John Widener had scuffed the tire on 3034 but there was other evidence to the contrary. For example Greg Davis examined the tire after Widener was suspended and he testified there was no tire damage. I do not credit the testimony of William Bass or Supervisor Steve Spence. Spence worked under Bass and appeared to testify as Bass. I credit the testimony of Kell, Badger, Widener, Davis, and Ross and discredit testimony of others, which conflicts with their testimony.

Conclusions

Threat of Termination; Threat of Futility of Selecting the Union; Told Employees that Others would be Terminated because

² As shown above Company President Jesse Lewis met with John Widener. According to Lewis’ testimony, Widener had complained that the perishable drivers made too much money and had too much time for their deliveries. The record including the testimony of Kell and Badger show that Widener’s meeting with Lewis and Dollar happened before April 7. Therefore, I find that Widener was mistaken in his testimony as to the date he met with Lewis and Dollar.

³ Both Kell and Badger were among the 15 drivers listed on the Union’s December 20, 1996 notice to Respondent of its organizing committee. Respondent posted that letter in its drivers’ breakroom.

of the Union; Gil Johnson; Threaten Futility of Selecting a Union; John Dollar

As shown above, there is no question but that Respondent was aware of John Widener's support of the Teamsters. Ronnie Kell spoke with Supervisors Gil Johnson and Mike Tate about John Widener on April 7, 1997. Gil Johnson said that he was going to let the drivers know what kind of man John Widener was. Johnson told Kell to tell Widener that "if he wanted to stir up some stink, that stink was here to stir up and he was the stink, that [Widener's] days were numbered and they were going to weed out the troublemakers." Johnson and Tate told Kell they would do what they could to save Kell's job. Kell asked Johnson if he had not been a supporter of the Union at one time. Johnson replied that he had been. A few days before the April 7 conversation, Gil Johnson told Kell that "'Mister Redneck' [John Widener] went down and told them that he could run any perishable or produce driver's run two hours quicker than any one of them could and this and that, just stirring up trouble."

Also during an April 7, 1997 meeting Gil Johnson told Fred Badger that maybe Badger was not happy with his job and that Gil Johnson wanted to know who had been calling Jesse Lewis a liar. Mike Tate was also in that meeting. Johnson said that drivers had been going up and down the road cussing on their CB about Mid-Mountain. Badger told Johnson that the drivers thought that Johnson was the one starting those rumors. Johnson said that he was and that he was "going to expose John Widener to be the loud mouth trouble maker that he is," and that the president of the Company gave him authority to do so. He said that Widener's days here were numbered and so was "a group of other people." John Widener was fired some 4 or 5 days later.

As shown above, I am convinced that Kell and Badger testified truthfully despite the denials of Gil Johnson and Mike Tate. On April 7, 1997, both Kell and Badger were known Teamsters supporters. As shown above Tate admitted that both were listed in the Teamsters' December letter listing its organizing committee. When another employee complained about an argument regarding comments by John Widener, it was two Teamsters committee employees that were called in to explain the argument. John Colley, the employee that complained, was not shown to be a union supporter. He was not listed on the Teamsters organizing committee. Respondent currently employs Ronald Kell and Fred Badger. Badger has worked for Respondent for 13 years. His as well as Kell's testimony was detailed especially regarding the April 7 conversation with Johnson and Tate. Conversely, although Johnson and Tate admitted talking with Kell and Badger, their testimony involved general denials and was not detailed.

John Widener met with Respondent President Jesse Lewis during March or April 1997. Lewis testified that Widener talked about the perishable drivers making 20 cents an hour more than the dry drivers and having too much time for their deliveries. Widener testified that John Dollar was present during that meeting and that Dollar said there would never be a union at Mid-Mountain and that the Union was no good for the people. At the time of that meeting John Widener was a known

Teamsters supporter. He was listed in the Teamsters organizing committee on the Teamsters' December letter to Respondent. As shown above, I credit the testimony of Widener.

The testimony of Ronald Kell and Fred Badger showed that Supervisor Gil Johnson and Assistant Transportation Manager Mike Tate were aware of rumors regarding what John Widener had said to Company President Jesse Lewis. Johnson told Badger that president of the Company had given him authority to expose John Widener to be the loud mouth troublemaker that he is. Johnson told Badger that he had heard that maybe Badger was not happy with his job and that he wanted to know who had been calling Jesse Lewis a liar. Badger had taken the position during arguments with other drivers that they should ask Widener for his version of what had occurred during his conversation with Company President Jesse Lewis.

The credited testimony of Ronnie Kell showed that Gil Johnson told him that John Widener's days were numbered and they were going to weed out the troublemakers. Johnson implied that Kell's job was also in danger by stating they were going to do what they could to save Kell's job. When Kell asked Johnson if Johnson had not been a union supporter at one time, Johnson did not say that he was not referring to the Union. Instead Johnson agreed that he had once favored the Union. Moreover, as shown above the credited evidence shows that the Union was brought up by John Dollar during the meeting including Jesse Lewis and John Widener during which Widener referred to the perishable drivers. As shown above, Respondent knew both Kell and Widener were Teamsters supporters. The credited testimony of Fred Badger showed that Johnson threatened him that the days were numbered for John Widener and a group of other people.

The record also showed that Johnson's reference to Widener stirring up stink involved both Widener's conduct on behalf of the Teamsters and Widener's comments regarding the perishable drivers. The credited evidence showed that among other things Widener complained that the perishable drivers were making 20 cents an hour more than the dry drivers. Complaints about wages on behalf of a group of employees have consistently been found to constitute protected concerted activity. Johnson's comments to Kell included reference to Widener's days were numbered and they were going to weed out troublemakers and Johnson's comments to Badger included that Badger was not happy with his job and that Widener's days were numbered and so was a group of other people.

Widener's comments involving the perishable drivers constituted protected activities and Respondent's threats because of that activity constitute a threat of termination in violation of Section 8(a)(1). Additionally, as shown above, Kell testified that he asked Johnson if he had not been a union supporter. In responding Johnson said nothing to show that he was not talking about the Union. That response supports a determination that Johnson's comments to Kell involved, at least in part, comments about Widener's Teamsters activities. Moreover, Widener's comments during the conversation in either March or April, with Lewis and Dollar, dealt with the perishable and the dry drivers. Widener complained that the dry drivers, including himself, were making 20 cents an hour less than the perishable drivers and that the perishable drivers were allowed

too long to make their runs. Lewis testified to the effect that he deduced from Widener's comments that Widener wanted him to reduce the hourly rates for the perishable drivers and to shorten the time allowed them to make their runs. However, a reasonable person could have determined from those comments that Widener, a dry driver, was complaining that the dry drivers were being deprived of equal treatment regarding pay and hours. That construction shows that Widener's comments constituted concerted activity regarding conditions of employment for the dry drivers. I find that Johnson's comments to Kell and Badger constitute threats that employees would be terminated, because of the Union. The comments by John Dollar during the March or April 1997 meeting with John Widener and Jesse Lewis that the Union was no good for the people and there would never be a union in Mid-Mountain constitute a threat of futility of selecting the Union.

Suspensions; Discharges; and John Widener

As to whether Respondent illegally suspended and/or discharged John Widener, I shall first consider whether the General Counsel proved through persuasive evidence that the Respondent acted out of antiunion animus. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

The full record showed without dispute that John Widener was an open Teamsters supporter and that Respondent knew of Widener's support of the Teamsters. Respondent's witnesses admitted that Widener was listed among the 15 members of the Teamsters' organizing committee (GC Exh. 6). The credited record also showed that Respondent harbored animus against the Teamsters and against John Widener's Teamsters and protected activities. As shown above Respondent's supervisors and agents engaged in 8(a)(1) activity including threats to discharge Widener. Shortly before Widener's discharge, Supervisor Gil Johnson threatened two employees that Widener's days were numbered, that Respondent was going to weed out troublemakers and the days were also numbered for a group of other people. Moreover, that evidence revealed that Johnson told employees that he had the Company president's authority to expose John Widener. Those threats to the employees were made on April 7, 1997. John Widener was suspended on April 10. He was subsequently discharged before the end of the suspension. That evidence shows that Respondent was motivated to discharge Widener's by his Teamsters and protected concerted activities. *Manno Electric*, 321 NLRB 1 fn. 12 (1996).

There remains a question as to whether Respondent proved it would have discharged Widener in the absence of union and protected concerted activities. *Wright Line*, supra; *NLRB v. Transportation Management Corp.*, supra.

Respondent contended that it discharged Widener because he failed to report an accident. Respondent argued that Widener damaged the fender on tractor 3034 on his April 10 shift and that Widener's condition report did not show that damage.

Some of the evidence in that regard is not in dispute. Tractor 3034 was driven by Widener on April 10 and Widener's condition report did not show any damage to tractor 3034.

There was a question as to the amount of damage. Robert Nudder testified that he noticed a split in the fender of one of the trucks shortly after seeing John Widener drive in. Nudder told Troy Gobble about the damage. Dispatcher Ray Poston testified that Troy Gobble reported damage to the tractor driven by John Widener. All the written reports are in evidence and all show there was a crack in the right fender. However, Transportation Manager Bill Bass testified that damage to tractor 3034 involved a cracked signal light and a scratch back to about half way of the wheel well where there was a break.⁴

There is also a question of whether Widener was driving the tractor when damage occurred. The record contained no direct evidence of Widener being involved in an accident.⁵ Vance Rust drove the tractor on April 9. Rust testified that tractor 3034 was not damaged when he drove it. However, Greg Davis testified that tractor 3034 had a 4-inch crack when he drove it on three occasions in March 1997. After Widener was suspended Davis looked at the tractor and saw that the crack had had been pulled out and was then 6 to 8 inches long. Supervisor Johnson testified that Jimmy Anderson told him that he had driven tractor 3034 a day or two before Widener and that he did not notice anything. However, Donnie Ross testified that he reported to Transportation Manager Bass that a crack in the fender had been apparent when he drove tractor 3034 on April 5 and 6. Bass replied to Ross that Widener had scuffed the tire.

I find that the testimony of Donnie Ross is critical to the determination of whether Respondent would have discharged Widener in the absence of his union or protected activities. Respondent currently employs Ross. Donnie Ross credibly testified that he examined tractor 3034 after hearing that Widener was suspended on April 10. He then spoke to either Steve Spence or Mike Tate about the damage. Afterward Transportation Manager Bill Bass came to Ross and said that he understood that Ross had some information. Ross told Bass that the same crack was on the fender when he drove tractor 3034 on April 5 and 6, only the crack was now a little bit bigger. He told Bass that the crack was pulled out not pushed in. Bass replied that Widener had scuffed the tire. Ross replied that the substance on the tire was sweet tasting and he hoped that nobody peed on it because he had just tasted it. Bass laughed. Ross said that the crack had always been there and Bass just shrugged. Ross testified that he also confronted Bass with the fact that the fuelers pick up hoods by the fenders because it's easier than picking them up from the front. On cross-examination Ross was asked to demonstrate on an actual fender in the courtroom, how someone pulling on the fender could cause damage. Ross pulled the fender and damaged it by enlarging a crack and actually pulling a section of the fiberglass

⁴ Ernest Barger testified that Bill Bass asked him to examine damage to tractor 3034 in April 1997. Michael Brooks testified that he examined pictures of damage to tractor 3034.

⁵ In comparison to Bass' decision to discharge Widener despite the lack of direct evidence that Widener was involved in an accident, Bass testified that he decided that he could not discharge Jimmy Anderson because, as Bass explained, we "could not for sure say that he completely falsified his log or his trip summary." Anderson and Randall Perdue were followed during portions of their runs to Pigeon Forge and Sevierville, Tennessee, on April 19, 1997 (see below).

fender off in his hand. Ross testified that many of Respondent's trucks have damage similar to that on tractor 3034. Transportation Manager Bass did not dispute the testimony of Donnie Ross.

Ross' testimony established several critical factors. First, he had put Respondent on notice that tractor 3034 was damaged before April 10. Donnie Ross told Transportation Manager Bass that the crack existed on April 5 and 6. The April 9 report of Vance Rust showed no damage, as did the April 10 report of John Widener.⁶

Second, Ross' testimony as well as other evidence including the testimony of Greg Davis, showed that other drivers including Vance Rust had driven tractor 3034 while it was damaged and had failed to note the damage on their condition reports.

Third, when Bass responded to Ross' comments, he ignored Ross' point that the fender was damaged before April 10 and said that Widener had scuffed the tire. However, before that moment no one had openly raised a question regarding damage to the tire. The written reports showing what Troy Gobble and Roy Poston found do not mention damage to a tire. Moreover, those reports say nothing about additional matters included in testimony by William Bass. There is no mention of damage to the signal light or a scratch from the signal light to the crack. Instead those reports dealt exclusively with a crack in the right front fender. I am convinced on the basis of that evidence and the full record that Bass exaggerated in his testimony as to the extent of damage.⁷

I am convinced from the above and the full record, that Respondent failed to show that it would have suspended and discharged John Widener in the absence of his protected concerted and union activity. Although there were reports of damage to tractor 3034, I find that it was not unusual for tractors to show damage nor was it unusual for the drivers to fail to note damage on their condition reports. The issue of whether tractor 3034 was damaged may have been presented to Respondent on April 10. However during the time before the actual discharge of Widener, Respondent learned that tractor 3034 had been dam-

aged before April 10. It learned that drivers other than John Widener had failed to note damage to tractor 3034 on their condition reports. Respondent learned that Widener as well as Vance Rust denied that he had damaged tractor 3034.

Finally, I am convinced that Respondent through the testimony of Transportation Manager William Bass, engaged in pretext in an effort to establish that it did not engage in illegal activity. The full record showed that Bass exaggerated his basis for discharging Widener. Bass testified that his actions were based on a determination that tractor 3034 had damage including a cracked signal light, a scratch back from the light and a crack in the fender as well as a scuffed tire. Damage to the signal light and the scratch were not included in reports submitted to Bass. Additionally, the credited testimony of Donnie Ross proved that Bass told him in effect that regardless of what damage had occurred before April 10, John Widener had scuffed a tire. That damage to the tire was also not supported by reports submitted to Bass. I find that Bass was untruthful in his testimony as to the reason why he discharged John Widener. *Wright Line*, supra; *Waste Steam Management*, 315 NLRB 1088 (1994); and *Harmony Corp.*, 301 NLRB 578 (1991).

I find on the basis of the credited record that Respondent failed to prove that it would have suspended and discharged John Widener in the absence of his union or protected activities. The record established that Widener was suspended and discharged in violation of Section 8(a)(1) and (3) of the Act.

Randall Perdue

Randall Perdue was also a driver. He was a member of the Teamsters in-plant organizing committee and he handed out Teamsters literature. The Teamsters wrote Respondent on December 20, 1996, and named the members of that in-plant committee. Perdue was included in that list of 15 employees (GC Exh. 6). The Teamsters' letter was posted in Respondent's breakroom.

Transportation Manager William Bass admitted that he knew that Perdue and John Widener supported the Teamsters.

Perdue was terminated because of an alleged incident on April 19, 1997. Respondent provided an April 23 memo to Perdue's personnel file, which indicated that he was in violation of work rules 1 and 7 and stated:

On Saturday (sic), April 19, 1997, you clocked in at Mid-Mountain at 3:00 p.m. and departed at 3:20 p.m. for your run to store #609 (Sevierville). Later you made a stop at exit #36. At 4:36 p.m. you departed exit #36 and arrived at store #609 at 5:45 p.m. At 6:15 p.m. you had finished switching your trailer and parked beside the store. Your tractor remained parked until you pulled out at 8:15 p.m. When you arrived at Mid-Mountain you reported that you had 30 minutes of over-time for a road delay (traffic).

Randall Perdue testified that he was held up by traffic during his April 19 run. He testified that he did stop at exit 36 where he saw two other drivers. Perdue followed driver Jimmy Anderson from exit 36 on down interstate highway 81, to interstate 40, then to route 66. He and Anderson were caught in traffic on route 66. Perdue testified that he arrived at the Sevierville store at 6:15 p.m. As shown below, Jimmy Ander-

⁶ The record showed that the drivers do not routinely note all damage on condition reports. Evidence including pictures, shows that several of the tractors were damaged including damage similar to that shown on a picture of tractor 3034 (R. Exh. 76d). (See for example pictures of another tractor showing cracks that had been repaired by rivets (GC Exh. 12).) Instead drivers appeared to note only new damage. (For example John Widener testified he did not report damage even though there was old damage to tractor 3034 on April 10. Widener testified that was his practice. Greg Davis testified there was damage to the right fender of tractor 3034 when he drove it on March 2, 18, and 19, 1997. Davis did not report that damage. He felt it was due to normal wear and tear.) In fact despite considerable evidence showing that there was a crack in the fender of tractor 3034 before April 10 (albeit it was not as large as it was on April 10), condition reports including the April 9, 1997 report from Vance Rust, showed absolutely no damage anywhere on the tractor. (E.g., Greg Davis testified that tractor 3034 had a 4-inch crack in the fender in March, 1997. Donnie Ross testified there was a crack in the fender when he drove it on April 5 and 6, 1997.)

⁷ I am mindful of other evidence regarding examination of tractor 3034 after Bass checked the damage. However, the cracked signal light, the scratch back to the crack and the scuffed tire were not reported as new damage by employees that noted the crack on April 10.

son also testified that he and Perdue were caught in traffic as they entered Sevierville and that the traffic came to a halt before reaching Perdue's delivery store. After dropping off his loaded trailer, Perdue attached an empty trailer to his tractor and pulled around to the side of the store. He stopped there, went into the store and had someone sign his bills, returned to the truck, worked on his logbook and checked out the tractor and trailer. Perdue left the store at 6:45 p.m. On the drive back to Abingdon, Perdue stopped at the Omelet Shoppe at exit 19 at 9:30 p.m. He stayed at the Omelet Shoppe until 10 p.m. and then drove to Mid-Mountain where he finished his routine and clocked out at 10:30 p.m. Perdue submitted a summary sheet for 30 minutes overtime.

Jimmy Anderson testified that he was driving to Pigeon Forge, Tennessee, while Perdue was driving to Sevierville, Tennessee. For part of the outgoing trip Anderson and Perdue ran in tandem. They met at exit 36 where Anderson had stopped for a soda. The traffic was heavier than normal as Anderson and Perdue drove into Sevierville. Perdue and Anderson discussed the matter over their CB radios. Both testified about how Perdue needed to be in the left-hand of the two right lanes, in order to make a wide turn into the Sevierville Food City store. The traffic was heavy and the two trucks came to a stop. Perdue testified that he turned into the Sevierville store at 6:15 p.m.

Transportation Manager William Bass testified that he met with the drivers when he took over his job in February 1997. He told the drivers that he would be monitoring their trip reports, that he would be riding with them and that he would be riding their routes.

Bass noticed that Randall Perdue's regular Saturday run to Sevierville from March through April 9, showed traffic delays in the Sevierville area. He decided to go to Sevierville with road supervisor Steve Spence and monitor the Saturday traffic. On April 19, he and Spence drove to Sevierville. Bass and Spence stopped at exit 36 and noticed trucks driven by Perdue and Jimmy Anderson leaving a truck stop. After getting coffee Bass and Spence left and caught up with Perdue and Anderson as they were exiting the interstate. They followed the trucks. Perdue turned in at the store he was to deliver to in Sevierville and Bass and Spence continued on behind Anderson toward Pigeon Forge. Bass and Spence testified that Perdue and Anderson did not encounter traffic in or before Sevierville. It was 5:45 p.m. when Perdue turned in to the Sevierville store. Bass encountered traffic congestion between Sevierville and Pigeon Forge and turned back to Sevierville. Bass and Spence parked in a McDonald's restaurant at 6:15 p.m., from where they observed Perdue's truck that was parked at its delivery store in Sevierville. Bass testified they observed there was no traffic congestion in that area.

Bass and Spence continued to observe Perdue's truck at the Sevierville store until Perdue left at 8:15 p.m. Bass testified that Perdue should have been at the Sevierville store for 30 minutes. Bass and Spence followed Perdue after he drove away from Sevierville.

Bill Bass and Steve Spence testified that after leaving Sevierville at 8:15 p.m., Perdue drove directly to the Abingdon facility where Perdue arrived and clocked out at 10:30 p.m.

Bass testified that he and Spence did not return to the Abingdon facility after watching to insure Perdue was going there. Instead they drove home. Bass said nothing about how they handled transportation if any; they used to come to work that day. Bass testified that he did not return to the facility until he reported to work on Monday, April 21. Steve Spence testified that upon deciding to drive to Sevierville on April 19, he and Bass "got one of the Company vehicles." Spence testified that he and Bass followed Perdue back to Mid-Mountain.

Perdue clocked out at Mid-Mountain at 10:30 p.m. Perdue claimed 1/2-hour overtime on his trip summary because of traffic congestion. Bill Bass received Perdue's trip report when Bass returned to work on April 21. He checked Perdue's DOT log and saw that Perdue had also claimed overtime in his log. Bass along with Steve Spence, talked to Perdue when Perdue next returned to work on April 23. Bass told Perdue that they had witnesses that placed him at the Sevierville store for 2 hours. Perdue said there was traffic congestion that he was in a restaurant with friends and was only delayed slightly. Perdue said that he left the store at 6:45 p.m. Bass terminated Perdue (see GC Exh. 7).

Perdue testified that he was called in and discharged on April 23. At the end of the meeting Supervisor Steve Spence looked at Perdue and commented "well, it was good while it lasted, wasn't it, hero?" Randall Perdue denied that he told Respondent that he was quitting at any time before April 19. Steve Spence denied that he told Perdue that it was good while it lasted hero.

Jimmy Anderson ran 2 hours 45 minutes overtime on April 19. Anderson was not disciplined for claiming overtime. He did receive a written warning for being late arriving at the Pigeon Forge store (R. Exh. 64). Bass testified that they could not justify termination of Anderson in view of their failure to follow him during his entire route. For that reason they could not be sure that Anderson had completely falsified his report and log. Anderson was not shown to have been a known Teamsters supporter.

The General Counsel introduced a document (GC Exh. 9), which indicated that Perdue terminated his employment on April 13, 1997. Human Resources Assistant Carolyn Henderson testified that she was formerly the secretary in human resources. She made a keying error regarding the computer print-out for Randall Perdue (cf. GC Exh. 7 and R. Exh. 83). Henderson keyed in the date April 13 when she should have keyed in April 23. The documents do not show when they were prepared. Henderson testified that she did not have the necessary information to prepare Respondent Exhibit 83 until she received General Counsel's Exh. 7 is dated April 23, 1997. Kippie Lambert is a payroll supervisor. He testified that he prepared form documents showing benefits entitlements for terminated employees. He sent a letter to Randall Perdue showing Perdue's date of termination as April 1, 1997. That date was based on information supplied by Carolyn Henderson in human resources.

Findings

Credibility

As shown above, I found in the heading under John Widener, that William Bass was not a credible witness. Steve Spence testified in support of Bass. However, in one area even their testimony appears to conflict. Bass testified that he did not return to Mid-Mountain after the Sevierville trip. Instead he drove home and did not return until April 21. Bass' testimony causes concern as to what happened to his and Spence's respective vehicles used to drive to work. Steve Spence testified that he and Bass selected a company automobile after arriving at work on April 19 and that they returned to Mid-Mountain after the trip to Sevierville. Spence's version appears to make more sense in consideration of what happened to their vehicles. Of course there is a possibility that both came to work by means other than their own automobiles but none of that was explained in the record. Instead the record shows only that Bass testified that he drove home without going to Mid-Mountain and Spence appeared to testify that the two did stop at Mid-Mountain. In view of my findings here, demeanor, and the full record, I do not credit either Bass or Spence to the extent their testimony conflicts with credited evidence. To the extent there is conflict between the three, I credit Randall Perdue.

Of the witnesses that testified regarding this matter I was most impressed with the demeanor of Jimmy Anderson. Anderson is a current employee and he was equally responsive to both direct and cross-examination. I credit the testimony of Anderson over that of other witnesses.

Conclusions

As to whether Respondent illegally discharged Perdue, I shall first consider whether the General Counsel proved through persuasive evidence that the Respondent acted out of antiunion animus. *Manno Electric*, 321 NLRB at 1 fn. 12; *Wright Line*, supra; and *NLRB v. Transportation Management Corp.*, supra.

The testimony is not in dispute but that Randall Perdue was an open Teamsters' supporter and that Respondent knew of Perdue's support of the Teamsters. The credited record also showed that Respondent harbored animus against the Teamsters. As shown above, Supervisor Gil Johnson threatened Fred Badger that John Widener and a group of other people's days were numbered. The threats by Johnson were made on April 7. As shown above I found that Respondent illegally discharged John Widener on or around April 15 because of his union and concerted activities. The incident that allegedly resulted in Perdue's discharge occurred on April 19.

Perdue was treated differently than another driver that was not shown to be a union supporter. Although Jimmy Anderson claimed 2-3/4 hours' overtime for his April 19 run, Bass elected not to discharge Anderson because he could not say that Anderson "completely falsified his log or his trip summary." Instead Anderson was given a written warning for late arrival at his Pigeon Forge delivery store (R. Exh. 64). According to Bass he elected to drive to Sevierville on April 19 in order to check traffic congestion. He and Spence passed through Sevierville at 5:45 p.m. and continued to follow Anderson enroute to Pigeon Forge until they were stopped by traffic congestion. After re-

turning to Sevierville Bass noted there was no traffic congestion in that area. Perdue delayed at Sevierville until 8:15 p.m. but claimed only 1/2-hour overtime as opposed to Anderson's claim. I credit Anderson's testimony showing there was traffic congestion in Sevierville.

The evidence supports a determination that Respondent was motivated to discharge Perdue by his union activities.

There remains a question of whether Respondent proved it would have discharged Perdue in the absence of union activities. *Wright Line*, supra; and *NLRB v. Transportation Management Corp.*, supra.

Respondent contended that Perdue was discharged because he allegedly falsified records regarding an April 19 trip to Sevierville, Tennessee.

Perdue was assigned to drive from Respondent's facility in Abingdon, Virginia, to a Food City grocery in Sevierville, Tennessee, and to return to Abingdon. Everyone agreed that Perdue's shift started at 3 p.m. Perdue testified that he started on his run at approximately 3:30 p.m. As shown above Perdue's termination memorandum noted that he left Mid-Mountain at 3:20 p.m.

The road map shows that the distance from Abingdon to exit 36 on interstate 81 is approximately 58 miles.⁸ From there down interstate 81 and interstate 40, to the Sevierville/Pigeon Forge, Tennessee exit at Route 66, is another approximately 52 miles. From that exit Sevierville is approximately 9 miles and Pigeon Forge is approximately 8 miles beyond Sevierville. An amusement park called Dollywood is on route 66 between Sevierville and Pigeon Forge.

William Bass testified that Perdue arrived at Food City in Sevierville at 5:45 p.m. That shows that Perdue made the drive of approximately 119 miles in 2 hours and 25 minutes. That time includes a stop off exit 36 and Perdue and Anderson driving from exit 36 at a speed which permitted Bass and Spence to catch the two trucks some 52 miles beyond exit 36 (i.e., before the two truck drivers exited on route 66).⁹

Bass testified that Perdue did not leave Sevierville on the return trip until 8:15 p.m. Perdue drove directly to Mid-Mountain where he finished his shift and clocked out at 10:30 p.m. Therefore, the return trip including clock out time required 2 hours and 15 minutes.

According to Randall Perdue's testimony he drove from Mid-Mountain (Abingdon) to Sevierville in 2 hours and 45 minutes. Included in that time was his stop at exit 36 and the traffic congestion near Sevierville. Perdue's drive back to Mid-Mountain included one-half hour at an Omelet Shoppe. Perdue testified that he arrived there at 9:30 and left the Omelet Shoppe at 10:00 p.m., drove the remaining 3 miles to Respondent's facility, wrapped up his work and clocked out at 10:30

⁸ 1997 Rand McNally Road Atlas, United States, Canada, Mexico.

⁹ Respondent introduced two notes from Perdue's personnel file (R. Exh. 62). The notes appeared to be exactly the same except that one contained a notation. The notes included "CI 300p depart 320p Randall stopped at exit # 36 4:20p. departed exit #36 at 4:36 p arrived at store # 609 at 5:45 p (15 min early finished switching and parked at 6:15 p (here one note had the notation 'slept for 2 hours') Left #609 at 8:15 p after arriving at Mid-Mt.—turned in a trip summary for 30 min O.T. for Road delay (traffic)".

p.m. The Omelet Shoppe was 3 miles short of his Mid-Mountain destination. Perdue's testimony shows that he made the drive to the Omelet Shoppe in 2 hours and 45 minutes. Perdue's daily log completed when he arrived back at Mid-Mountain, supports his testimony (R. Exh. 63).

As in the case of John Widener, there was testimony from a current employee. Jimmy Anderson testified about the trip to Sevierville. As shown above, Perdue caught Anderson at exit 36 and they drove together from there until Perdue turned off at the Food City grocery in Sevierville. Anderson's testimony directly conflicts with that of Bass and Spence. Anderson testified that the traffic was congested before he and Perdue reached Sevierville Food City and that the traffic forced he and Perdue to come to a stop. In view of his demeanor and the full record including Anderson's status as a current employee I credit his testimony.

I have concluded from the record that Perdue left the Abingdon facility at 3:20 p.m. That is the time reflected on the only documents showing the departure time. Perdue's testimony that he arrived at the Food City grocery in Sevierville at 6:15 p.m. appears correct in view of the credited testimony of Jimmy Anderson showing they were stopped in traffic before reaching Food City.

If consideration of the two versions of the return trip I notice that Perdue testified that he drove straight from Sevierville to the Omelet Shoppe between 6:45 and 9:30 p.m. That means he required 2 hours and 45 minutes to drive 3 miles less than the full trip back to the Mid-Mountain facility. Under Bass and Spence's version Perdue left Sevierville at 8:15 p.m. and arrived back at Mid-Mountain in Abingdon at about 10:15 p.m.

As to the return trip, I do not credit the testimony of William Bass and Steve Spence. The credited evidence shows that Perdue arrived at the Food City grocery in Sevierville later than the time set by the testimony of Bass and Spence.

That evidence illustrated that Respondent engaged in pretext in order to discharge Randall Perdue. That finding is further supported by the conflict in the testimony of William Bass and Steve Spence regarding what occurred when they returned to Abingdon on April 19. Bass testified that they did not return to Mid-Mountain. Instead they drove directly home and Bass did not return to Mid-Mountain until April 21. Spence testified they selected a company car to drive to Sevierville and returned to Mid-Mountain upon finishing their trip. *Wright Line*, 251 NLRB 1083 (1980), enf'd, 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *Waste Steam Management, Inc.*, supra; and *Harmony Corp.*, supra.

In view of the above I find that Respondent failed to show that it would have discharged Randall Perdue in the absence of his Union activities. Respondent engaged in pretext in order to discharge Randall Perdue. I find that Respondent discharged Randall Perdue in violation of Section 8(a)(1) and (3) of the Act.

Written Warning; Suspensions; Discharges; Tony Orfield

Tony Orfield worked for Respondent from 1992 until 1997. He was an order selector. Orfield engaged in union activities including soliciting employees to sign union cards and wearing shirts and hats with union insignia. He successfully recruited 20

out of 35 people in perishable and produce to sign union cards. During August 1996 Supervisor Jim Phipps asked Orfield if he wanted to attend a company meeting. Orfield was wearing an UFCW shirt and when he turned around Phipps could see UFCW on the front of the shirt. Orfield told Phipps that he didn't "want to go listen to the Company's lies." Warehouse Manager Wes Basham came to Orfield and said, "Well, I'm glad you showed your true colors." Basham told Orfield that if the Union got in there he would have to ask permission to go on break or go to the bathroom. Wes Basham said, "Mr. Orfield, you're a young man. You just built a new house, got a beautiful wife, and two beautiful kids and he said I'd hate to see you lose all that."

Basham admitted talking to Orfield about his union shirt. Orfield was the only employee that wore a shirt in Basham's shop. He denied telling Orfield that the Company would close if it turned union.

Orfield had an accident in the warehouse in October 1996. His forklift hit the leg of a rack as he backed through a flap door. He called the supervisors immediately. Four supervisors came. Orfield asked if he would receive a writeup. Supervisors Vaughan and Noonchester said that he would not be written up because it was an accident and that accidents happen. They said that Jeff Boyd has accidents all the time. Two days later, Orfield was told by Wes Basham and Jim Caudill that he was being suspended and written up for the accident. Orfield said that he did not think that was fair because Jeff Boyd has all kinds of accidents without being written up. The supervisors replied they were not talking about Jeff Boyd but were talking about Tony Orfield. He told them that Vaughan and Noonchester had told him that he would not be written up. Basham and Caudill said that Orfield was not getting written up because of his accident but because he had violated company policy by backing through the door. He was given 3 days suspension and a final warning. When Orfield returned after his suspension, he asked his supervisors and fellow employees about the rule prohibiting backing forklifts through a flap door. None of the supervisors or employees had heard about that rule. Orfield saw all three of his supervisors' back forklifts through flap doors after he returned to work.

James Caudill is assistant warehouse manager. He was formerly a receiving supervisor. Orfield told Caudill that he had an accident as Caudill was walking through the dairy cooler. Orfield's machine (a SGX) had hit a rack. Orfield told Caudill that he had lost control of his SGX as he was coming through the curtain. The rack leg was bent backwards and Orfield's SGX was covered with tons of butter. Caudill reported the accident to night shift shipping supervisor Randy Noonchester. Caudill performed an investigation the following day at the direction of Wes Basham. He measured the distance from the rack to the doors (curtain) and concluded that Orfield had been operating his SGX improperly and that had caused the accident. Caudill based his findings on Orfield's statement that he had come through the door (curtain) fork-first, which means the machine was running backwards. James Caudill submitted his investigation report to Respondent (R. Exh. 6) and he met with Wes Basham after submitting his report. Orfield was awarded a final warning (R. Exh. 3). Caudill denied there was any mention of

the Union when Orfield was awarded the final warning. He also denied that Orfield was told he would not receive any punishment during a conversation while Caudill was present.

Randy Noonchester testified that he investigated Orfield's October 1996 accident. He examined the accident scene and took a statement from Orfield. He determined that Orfield went through curtained doors driving his SGX backward and lost control. Orfield's SGX struck a rack containing approximately 12 half pallets of butter. The rack leg crumpled and the rack fell covering the SGX with butter. The value of the damaged butter was estimated to be \$4700. Noonchester submitted a report to Wes Basham (R. Exh. 4). Noonchester denied that he told Orfield that he would not be written up. The decision to suspend Orfield was based on discussions involving Wes Basham and consultation with the human resources department to insure they were following precedence. The normal practice is to always check with human resources prior to administering discipline. Noonchester testified that he did not personally make a recommendation as to the level of punishment to award Orfield. He denied that he knew that Orfield was a union supporter at the time of the accident.

Randy Vaughn recalled Orfield having two accidents. One involved some pallets of butter. Vaughn went to the accident site. The forks on Orfield's SGX were pointed toward the butter rack and away from the door curtains. The butter from the rack had fallen on top of Orfield's SGX. Vaughn believes he told Orfield that he would not lose his job over the accident because "they try to do is be fair." He denied telling Orfield that he had been disciplined because of his union activity and he denied that he told Orfield that he would not be warned.

James Day was another supervisor that testified about Orfield's October accident. He heard about the accident after returning to work following time off.

Perishable Manager Wes Basham testified that Orfield received a warning in October 1996 (R. Exh. 97). He met with Orfield and James Caudill and gave Orfield the warning. Basham had accident reports from Noonchester and Caudill and a written statement from Orfield. Basham testified that Orfield could have been terminated for that incident. Basham estimated the value of the damaged butter at \$1500 to \$2500. He checked with human resources, as was the usual routine, before issuing disciplinary action to Orfield. Another employee, Ron Ryan, had received a warning for a similar occurrence (R. Exh. 7).

On January 20, 1997, Orfield tried to follow another forklift (Jerry Price) through the apple room cooler door. The door closed on his forklift. He called Supervisor Trey Browning and Browning asked what had happened. Orfield explained that he had not pulled the cord that closed the door but that it had shut on his machine. Orfield mentioned that perhaps the cord had hung on Jerry Price's forklift. Price came back to the accident scene and agreed that the cord may have snagged on his machine. Browning filled out an accident report that night with Orfield's help.

Darrell Millard is a switcher for Respondent. He described the doors into the apple room as being like elevator doors. They open and close by pulling cords outside and inside the apple room. Millard was standing near the doors when Tony Orfield approached. Jerry Price had just gone through the doors and

they were beginning to close, as Orfield was 2 or 3 feet away. The doors caught on Orfield's machine as he passed through. Millard did not see the cords snag on either Price or Orfield's machines.

Trey Browning formerly worked for Respondent as produce team leader. He noticed Jerry Price drive through the doors and he swept trash out of the way for Price to place his pallets. Tony Orfield yelled at Browning and he walked over and saw the doors had closed on Orfield's SGX. Browning talked with Orfield and Jerry Price. Neither said anything about cords snagging on their equipment. Browning denied that he said that the cord could have snagged on either Price or Orfield's equipment. Browning submitted a note to Wes Basham (R. Exh. 8). In a subsequent conversation Jerry Price told Browning to tell Basham that Price was the one that hit the door. Price said they'd just write him up but if it was Orfield that hit the door, Orfield would be fired (see R. Exh. 9(a)). Browning denied that he knew Orfield to be a union supporter.

When Orfield reported the next day, Supervisor Terry Boyd said he would have to see Wes Basham. Basham told him they had to terminate him. Orfield asked why since he had done nothing wrong. Basham said something about Orfield getting off his machine, pulling the cord to close the doors and then calling Trey Browning.

Perishable Manager Wes Basham testified about Orfield's discharge. After receiving a report from Trey Browning (R. Exh. 9), Basham phoned Browning and discussed the accident. Basham then checked with human resources. He learned that another employee, Johnny Coalson, had been terminated under similar circumstances (R. Exh. 11). Basham met with Orfield and Terry Boyd and informed Orfield of his termination (R. Exh. 98). He admitted that he knew of Orfield's union activity but he denied that he said anything to Orfield about union activity.

Jerry Price is a forklift operator in produce. On January 20, 1997, Price saw Tony Orfield coming across the dock about to enter the apple cooler. Price drove through the door and set some pallets down on the dock. He heard Tony Orfield yell for a supervisor. Orfield was standing by his forklift. Price walked over and heard Orfield explain to Supervisor Trey Browning that he had not pulled the cord to shut the door. Price told Browning that he had not pulled the cord when he came through the door but that it was possible the cord had hung on Price's machine. Price also talked to Supervisor Terry Boyd. He told Boyd that the only explanation was that the cord had hung on Price's machine. The following Monday Wes Bessham said that he wanted to explain to Price why Orfield had been fired. Bessham said the company was just being consistent with what they had done in other cases. Bessham told Price that he had conducted tests and he was convinced that Orfield had pulled the cord on the inside of the apple room. Price replied that he did not believe that is what had happened.

Price recalled that forklift operator Tandy Southerland had an accident in October or November 1996, on the same door as Price. The door was damaged. Southerland was not discharged. Southerland did not show whether or not he supported the UFCW.

Findings

Credibility

I was impressed with the demeanor of Tony Orfield, James Caudill, Randy Noonchester, Darrell Millard, Trey Browning, and Jerry Price. The testimony of Orfield regarding his conversation with Basham about the UFCW was not disputed by Basham. Basham denied that he threatened Orfield that the plant would close if the Union came in but he did not deny that he otherwise threatened Orfield. I credit Orfield. As shown below, I also credit evidence showing that Orfield was treated in a disparate manner.

Conclusions

I shall first consider whether the General Counsel proved through persuasive evidence that the Respondent acted out of antiunion animus. *Manno Electric*, supra; *Wright Line*, supra; *NLRB v. Transportation Management Corp.*, supra.

As shown here Tony Orfield engaged in UFCW activity and Respondent was aware of his support of the UFCW. Orfield's credited testimony proved that Wes Basham told him that he would have to ask for permission to go on break or to the bathroom if the Union got in and Basham threatened Orfield by saying he would hate to see Orfield lose his family and new house. Basham admitted that he talked to Orfield in August 1996 after noticing that he was wearing a union shirt. Basham did not deny the comments testified to by Orfield. He denied that he threatened Orfield that the facility would close if it turns union. However, Orfield did not testify that Basham made a threat to close. Although Basham's conversation with Orfield was not alleged as a violation, I credited Orfield's testimony, which shows a serious threat because of Orfield's union activities. In view of all the matters that occurred in early 1997, as shown in this decision, the timing of Respondent's discharge of Orfield is significant. In view of that evidence, the evidence as shown herein of Respondent's antiunion animus and the timing of its action against Tony Orfield, I find that the General Counsel proved prima facie that Respondent was motivated by union animus to suspended and discharged Tony Orfield.

There is a question as to whether Respondent would have suspended and discharged Orfield in the absence of his union activities. Tony Orfield had two accidents while working for Respondent. As shown above he received a final warning and suspension for an October 1996 accident and he was discharged for another accident in January 1997. Wes Basham admitted that Orfield did not have an accident before October 1996.

In October 1996 Orfield backed through a flap (curtain) door and struck the leg of a rack. Tons of butter fell from the rack and covered Orfield's machine (SGX). On January 20, 1997, Orfield tried to drive his SGX through an opening as the doors were closing. The doors closed on his machine. There was disputed evidence regarding why the doors closed. However, there is no dispute but that Orfield entered the doors without having first pulled the cord that opened the door. Instead Orfield saw another machine come through the door and he tried to pass through before the door closed after that machine.

Respondent argued that Orfield was not treated with disparity. Wes Basham testified that former employee Ron Ryan was suspended and given a final written warning because he hit a

pallet rack leg while operating a forklift (R. Exh. 7). Ryan was suspended on December 1, 1995. Also, Basham testified that employee Johnny Coalson was fired when he had an accident after he had received a final warning. Coalson was terminated on December 17, 1996 (R. Exh. 11). Respondent questioned Tony Orfield regarding the discipline of Johnny Coalson. Orfield testified that Coalson had fallen asleep on his scrubber machine and ran into a pallet leg. Coalson failed to report the accident.

Disciplinary actions resulting from accidents were not limited to Orfield, Ryan and Coalson. Documents contained in General Counsel's Exh. 16 show that several employees received either a talking to or a verbal warning for damage to equipment or merchandise.

Tandy Sutherland received a verbal warning on December 9, 1996, because he hit the door that enters the apple room with an SGX. Brad Webb received a verbal correction report on May 22, 1994, when he tore an eye wash station off the wall as he was picking up yellow cart with a tow motor. An undated memo shows that Bill Osboard "got pallet jack caught in dairy cooler door. Motor runs but when you pull the cord the doors won't open. I cautioned him to be more careful." A July 11, 1995 memo reflected that Jeffrey Boyd bent a rail while letting the boom down of a forklift. Eugene Tuell was issued a verbal correction report on May 24, 1994, for "knocking the heater down from above the freezer door."

A memo was written regarding David Atwell damaging a door on February 27, 1991. A memo dated November 13, 1988, showed that Mike Harmon had been talked to about hitting a door as he was taking a stack of pallets outside. The memo noted that the door will not close all the way down because of the damage. David Kiser was talked to about his damaging 27 cases of cat food. Kiser was stacking a pallet of product when "he ran into the back stack causing them to fall."

Assistant Warehouse Manager James Caudill distinguished Orfield's October final warning from other disciplinary actions. He testified that Orfield was suspended for "misuse and the amount of damage done." I find that explanation fails to support a finding that Orfield would have been suspended then discharged, in the absence of Union activities. As to Caudill's testimony that Orfield's case should be distinguished because he misused his equipment, the above documents show that all the incidents included therein involved misuse of equipment and none, (with the exception of Ron Ryan and Johnny Coalson) resulted in more than a verbal warnings. Ron Ryan was suspended but not discharged. Coalson fell asleep on his scrubber machine and did not report the accident on the day of the occurrence.

As to "the amount of damage," the testimony of Respondent's supervisors illustrates that issue was never investigated and was an apparent afterthought. The evidence shows that no one bothered to determine the amount of damage and there had been no discussions as to damages. At the hearing James Caudill estimated the damage at \$500. Wes Basham estimated the damage at \$1500 to \$2500. Randy Noonchester estimated the damage at \$4700. I am convinced that there would not have been such confusion in estimates if the supervisors had fully considered the matter of damages in determining the severity of

Orfield's punishment. Instead the evidence shows that Respondent engaged in pretext in an effort to justify Orfield's suspension and discharge. *Wright Line*, supra; *Waste Steam Management*, supra; and *Harmony Corp.*, 301 NLRB 578 (1991). I find that the record failed to show that Respondent would have suspended, given a final warning and discharged Tony Orfield in the absence of union activities and that Respondent violated Section 8(a)(1) and (3) by suspending and discharging Orfield.

Ronnie G. Brooks

Ronnie Brooks was an aisle forklift operator. He started working for Respondent in October 1985. Brooks called in sick on August 5, 1996. Eventually, he had surgery on his hand and was off work on medical leave. On February 5, 1997, his physician signed a release for Brooks to return to work on February 24 (GC Exh. 3).

Respondent wrote Brooks on January 13, 1997, that he would reach his maximum allowable disability leave on February 11 (GC Exh. 2).¹⁰ Respondent advised Brooks that he would be terminated if he did not return to work by February 11 unless he made a written request for an extension of his leave. Director of Human Resources Mark Millwood testified that Respondent reserved the right to terminate anyone out with a disability for over 6 months (see employee handbook—R. Exh. 24).

Brooks participated in the UFCW organizing campaign before he went on sick leave, by signing a UFCW authorization card. The parties stipulated that counsel for the General Counsel and Respondent reviewed Union authorization cards signed by employees including Brooks, on February 6, 1997. Respondent posted a list of names of witnesses for the upcoming NLRB hearing and counsel for the General Counsel shared an index of card signers with Respondent on February 10, 1997.

On February 6, 1997 (GC Exh. 4), Ronnie Brooks submitted a written request for an additional 2 weeks of leave. On February 14 Respondent wrote Brooks denying his request and terminating his employment (GC Exh. 5).

John Dollar no longer works for Respondent. He was formerly the director of operations and human resources. Dollar testified that Brooks was terminated because he was on disability leave for over 183 days. Respondent denied Brook's request for an extension for two reasons. One, it was company policy to deny extension of disability leave and two, Brook's job was no longer needed and had been eliminated. Dollar recalled that Respondent always discharged employees that exceeded 183 days disability leave.

Findings

Credibility

Significant evidence regarding Brooks is not in dispute. I find that Brooks engaged in Union activities and that Respondent learned that Brooks had signed an authorization card when it reviewed cards signed by employees on February 6, 1997. Respondent also learned on February 10 that Brooks was a potential witness for the General Counsel in an upcoming hearing. The evidence is not in dispute as to other factors including

Brooks disability leave, the fact that Respondent notified him of his potential termination (GC Exh. 2), his request for extension of leave and his termination (see GC Exh. 5).

Conclusions

I shall first consider whether the General Counsel proved through persuasive evidence that the Respondent acted out of antiunion animus. *Manno Electric*, supra; *Wright Line*, supra; *NLRB v. Transportation Management Corp.*, supra.

As shown above, Respondent learned that Ronnie Brooks had signed a union authorization card on February 6, 1997. On February 13, it discharged Brooks. In view of my findings herein regarding animus and the evidence showing knowledge and timing, I find that the General Counsel proved prima facie that Respondent was motivated by antiunion animus to discharge Ronnie Brooks.

There is a question of whether Brooks would have been terminated in the absence of his union activities. On January 13, 1997, Respondent advised Brooks that he would be discharged "unless you request a personal leave of absence through the Human Resources Department."

On February 6, Brooks requested 2 additional weeks of leave until May 24, 1997. He attached a February 5, 1997 memo from a physician showing that Brooks may return to work without restriction on February 24, 1997.

On February 14, Respondent wrote Brooks that his request was denied and his employment terminated.

The above shows that Ronnie Brooks complied with conditions expressed in Respondent's January 13 letter. Respondent offered evidence that it has denied request for extensions of sick leave. However, those instances showed the employees requested extensions of medical leave without date for the leave to expire and it was apparent that each anticipated a long period of extended leave. On the other hand, Brooks asked for a definite time of only 13 days additional leave. Respondent also contends that it has no need for Brooks in that it was never necessary to fill his job. However, Respondent stated in its January 13 letter to Brooks that it could have reassigned him to another job.

I find that the record failed to show that Brooks would have been terminated in the absence of union activity. Respondent terminated his employment in violation of Section 8(a)(1) and (3) of the Act.

Written Warnings; Daniel Hounshell

Daniel Hounshell has worked for Respondent for over 11 years. He operates a forklift. Hounshell attended UFCW meetings and wore a T-shirt to work about once a week during the organizing campaign. Hounshell was shown on a December 18, 1996 TV newscast while he was attending a UFCW meeting in Abingdon. That film was shown on a local newscast. Only two African-American employees supported UFCW and Hounshell was the only one shown on the December 18 news.

Tony Lewis asked Hounshell to work overtime on December 19. Hounshell declined saying he needed to leave. Lewis replied that "Mahoney needs to talk to you." However, Mahoney never came to see him and Hounshell clocked out about 4 minutes before 5 o'clock. Lewis admitted that he knew that Hounshell was a single parent and Hounshell had told him that he

¹⁰ The Tr. at p. 760, erroneously reflects that I referred to the attorneys as "children." I correct the record and strike the word children.

could not work overtime without prior notice because he had to pick up his child. Lewis admitted that he told Jeff Mahoney that Hounshell had a problem with working over on December 19. Lewis was aware that Hounshell frequently wore a UFCW shirt to work. He wore the shirt after the election.

On December 23 Tony Lewis told Hounshell that Mahoney would like to talk to him about December 19 but Mahoney did not show up that day. Nevertheless, Hounshell was awarded a verbal warning. He met with Tony Lewis and Alvin Olinger in the conference room. Lewis told Hounshell that he was a good worker but Hounshell was given the verbal warning for leaving and not working overtime without checking with Jeff Mahoney (R. Exh. 96).

Assistant Warehouse Manager Jeff Mahoney was formerly in charge of receiving. It snowed in December 1996 and everyone was asked to work over. Anyone that could not work overtime was to tell his or her team leader. The following day employees were again asked to work overtime. At that time anyone that expressed an unwillingness to work over was told to report to Mahoney. Daniel Hounshell received a warning for leaving without checking with Mahoney (R. Exh. 96). Hounshell did not report to Mahoney and he did not work overtime. Several employees including union supporters Coy Wolfe, John Sykes, and Freddie Hall asked to be excused that day and all were granted authority to leave without working overtime. All those employees were listed as union committeemen on a letter received by Respondent (R. Exh. 2). That letter was mailed by the UFCW on July 23, 1996. Mahoney testified that he was unaware that Hounshell appeared on TV at a UFCW meeting.

Mahoney testified that he could not remember whether he approached Coy Wolfe or Wolfe approached him, regarding whether Wolfe would work overtime. He admitted that he probably approached Wolfe after being told by Tony Lewis that Wolfe could not work overtime. Mahoney admitted that he went to John Sykes and confirmed that Sykes could not work overtime after learning that from Tony Lewis. He admitted that he saw some employees at the time clock and gave them permission to leave before working overtime. Those included some that were not listed on the UFCW organizing committee. When asked about approaching Daniel Hounshell, Mahoney testified that Hounshell left about 5 minutes early that day.¹¹ That was before Mahoney arrived at the clock.

Dry Warehouse Manager Buddy Honaker testified that he asked employees to work overtime on December 18 or 19, 1996, following a snowstorm. He told the employees to see their team leader if there was a problem with working overtime. Jeff Mahoney and Mark Hartzog were appointed point men to insure the necessary shipments were made. Honaker admitted that Hounshell had worn a UFCW shirt and hat.

Hounshell had never been disciplined for refusing to work overtime before December 19 even though he had actually refused to work overtime on a number of occasions.

John Sykes is a forklift operator. He was one the UFCW organizing committee and he wore UFCW paraphernalia to work. He did not wear the UFCW paraphernalia after the August

1996 election. Other UFCW supporters continued to wear UFCW T-shirts after the election. Sykes saw Daniel Hounshell at a UFCW meeting on the December 18, 1996 11 p.m. TV news. Hounshell had on a vote yes UFCW T-shirt. Hounshell is one of only three African-Americans that worked for Respondent and one of two that supported UFCW.

Tony Lewis asked John Sykes to work overtime on December 19. Sykes replied that he had car trouble and could not work overtime. Lewis said that was okay. He said nothing about seeing Jeff Mahoney. Mahoney did come by Sykes' workstation that day and asked if Sykes had car trouble. Mahoney then said okay and walked off. As Sykes was leaving work with some other employees, Mahoney pointed to him and repeated that Sykes had car trouble. He also pointed to some of the other employees and said something about why each was leaving. Those other employees leaving included Coy Wolfe, Mike Harmon, Freddie Hall, and Curtis Henley. Mahoney did not tell anyone they could not leave.

Tony Lewis asked Mike Harmon to work overtime on December 19, 1996. Harmon said that he could not work overtime, that he had to pick up his son at the babysitter's. Later, Jeff Mahoney saw Harmon at the timeclock and said, "[S]o you have to go pick up your son," and Harmon nodded that was correct. Mahoney told the employees that left that Respondent would expect them to work overtime in the future because there was going to be some bad weather.

Findings

Credibility

I was impressed with the demeanor of Daniel Hounshell, John Sykes, Tony Lewis, and Buddy Honaker as to this particular issue. I was not impressed with the demeanor of Jeff Mahoney and I do not credit his testimony to the extent it would show that he did not treat Hounshell discriminatorily.

Conclusions

I shall consider whether the record showed that the Respondent acted out of antiunion animus. *Manno Electric*, supra; *Wright Line*, supra; *NLRB v. Transportation Management Corp.*, supra.

As shown throughout this decision Respondent demonstrated animus against the UFCW. The evidence reveals that Daniel Hounshell was shown on TV news at a UFCW meeting while wearing a "vote yes" shirt. The credited record showed that Hounshell was discriminatorily warned for refusing to work overtime on the day after that TV program. The record showed that no one else was disciplined for refusing to work overtime on December 19. I find that evidence supports a finding that Respondent warned Hounshell because of its union animus.

Respondent contended that it would have warned Hounshell in the absence of his union activity because he failed to follow directions and check with Jeff Mahoney before leaving on December 19. I find that the record does not support Respondent. Other employees also failed to check with Mahoney. Mahoney was standing at the timeclock and he commented to several employees regarding why they could not work overtime. Mahoney testified that he did not see Hounshell but that was because Hounshell left before Mahoney reached the timeclock. I

¹¹ Hounshell's verbal warning (R. Exh. 96) shows that he left 4 minutes early.

do not credit Mahoney's testimony in that regard. Instead I credit Hounshell that he saw Mahoney as he was leaving on April 19 and that he and Mahoney "looked eye to eye." Although Hounshell may have left 4 minutes early on December 19, he was not disciplined for leaving early. I am convinced and find that Respondent engaged in pretext in claiming that Hounshell would have been warned in the absence of his UFCW activity. *Wright Line*, supra; *Waste Steam Management*, supra; and *Harmony Corp.*, 301 NLRB 578 (1991). I find that Respondent was motivated by union animus to warn Hounshell and the record failed to show that Hounshell would have been warned in the absence of his union activity. I find that he was warned in violation of Section 8(a)(1) and (3) of the Act.

Larry Nunley

Larry Nunley operates a forklift. He was a representative for the Teamsters during NLRB hearings in February 1997. Nunley was called to the training room after February 27, 1997, where he met with Supervisors Mark Hartzog and Alvin Olinger. They told Nunley that he had misloaded a pallet on store 606 that should have gone to store 602. Nunley reminded Hartzog and Olinger that they had said they would not do anything about that incident because the truck went there every day. Hartzog and Olinger replied that they had a picture taken by a lady in the store showing that it was Nunley's misload. Nunley stated that the picture did not show that he was the one that had loaded the pallet. Nunley was given a writeup (R. Exh. 35).

Greg Johnson is an auditor for Respondent. He is responsible for checking the quality of work. Johnson recalled a misshipment by Larry Nunley in February 1997. Johnson received a phone call from the manager of store 606 complaining that she had received the misshipment. He denied that he talked with Nunley about that incident and he denied that he told Nunley or Tim Alderson that he thought that Tim Salyer was responsible for the misshipment.

Alvin Olinger testified about the February 1997 misshipment to store 606. He denied telling Nunley that he thought Tim Salyer was responsible for the misshipment or that Nunley's action would be overlooked. Salyer had loaded for shipment to store 602 but that shipment was not set to depart until some 5 hours and 15 minutes after the shipment departed for store 606. Olinger denied telling Nunley that Bobby Collins had a misshipment that had been overlooked. Alvin Olinger testified that contrary to testimony by Eugene Osborne, Price, Collins, and Chapman did receive warnings. Price was written up three times and was ultimately terminated for misshipments (R. Exh. 42, 43). Chapman was given a verbal warning on August 29, 1986 (R. Exh. 46) and Bobby Collins received a verbal on May 12, 1986 (R. Exh. 47). Olinger testified that Salyers should not have received a warning. Instead that misload was the responsibility of Larry Nunley and Nunley received the warning. Olinger testified that company supporter Bernie Gobble received a notation for two misloaded pallets on September 1, 1995 (R. Exh. 48).

Mark Hartzog, supervisor (team leader), denied telling Nunley that Nunley's misshipment would be overlooked.

As shown below, Eugene Osborne testified that he heard about misshipments around once each month and that employ-

ees are not always disciplined for misshipments. Employees Tim Salyers, Bobby Collins, Craig Price, and Charlie Chapman had misshipments and were not disciplined.

As shown above, Bobby Collins testified that he never did anything to show that he supported the union. He has been responsible for two misloads. Once in 1996, Alvin Olinger told Collins that Collins had a misload. Collins was not disciplined. He was told that he had a second misload in June. That was about six months after his first misload. Collins talked to first Alvin Olinger then Buddy Honaker, but was not disciplined for that occurrence. Collins admitted that Bernie Gobble had received a warning because of a misshipment.

Findings

Credibility

I observed the demeanor of Larry Nunley, Greg Johnson, Alvin Olinger, Mark Hartzog, Eugene Osborne, and Bobby Collins. I am convinced that Nunley and Collins were truthful in view of their demeanor and the full record. Both are currently employed by Respondent and each has worked at Mid-Mountain for 12 years.

Conclusions

The test in determining whether a warning constitutes an unfair labor practice requires that I first consider whether the Respondent acted out of antiunion animus. *Manno Electric*, 321 NLRB 1 fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

As in all the above cases, the record established Respondent's animus towards unions and it showed that Nunley was acting as representative for the Teamsters during NLRB hearings in February 1997. As in the allegations regarding Eugene Osborne, I am concerned with whether Nunley was treated in a disparate manner.

Several of the employees noted by Alvin Olinger for misshipments were involved during the 1980s and up until 1995. A note was made about Bernie Gobble misloading two pallets on September 1, 1995. Eugene Osborne was previously noted for misshipments in 1986, 1989, 1991, 1993, and 1994.

After the UFCW filed charges on March 13, 1997, alleging the disciplinary actions against Osborne and Nunley were unlawful, Respondent disciplined and finally discharged Craig Price. Price was given a written warning on April 9, 1997, because he misshipped 45 cases of product. The written warning noted that Price had received a verbal warning for misshipment on March 14, 1997. Price was discharged on May 16, 1997, because he misshipped a pallet of goods to store 685 that should have gone to store 686, and a cigarette and tobacco order to store 610 that should have gone to store 40; and he failed to ship a pallet of repack product to store 632. Eugene Osborne's alleged illegal disciplinary action was a January 20, 1997 verbal warning for "misshipment of two pallets of specials for store # 827, Eugene shipped to store # 678."

Respondent was not consistent in its practice of disciplining employees for misshipments. Occasionally, as in the case of Bobby Collins, employees were not disciplined for misship-

ments. However, in numerous other occasions employees were warned and even discharged for that infraction.

Nevertheless, I am convinced that Larry Nunley was treated with disparity. Nunley was shown to have engaged in protected activity at a NLRB hearing immediately before his written warning. He acted as NLRB representative during 2 weeks of hearing in February and the misshipment occurred on the next to last day in that month. As shown below, unlike Eugene Osborne, Nunley received a written warning and unlike Osborne, Nunley was not shown to have been a habitual violator of the policy against misshipments. Nunley did not have a misshipment before February 27. Additionally, Nunley must be distinguished from Craig Price. Price was disciplined after charges were filed alleging that Nunley and Osborne were illegally disciplined for misshipments and an examination of Price's warnings and discharge (R. Exhs. 41, 42) shows that Price's offenses were far more serious and numerous than Nunley's. Respondent violated Section 8(a)(1) and (3) by warning Nunley.

Eugene Osborne

Eugene Osborne has worked for Respondent for over 12 years. His present job is HBA order selector. Before becoming an order selector in 1997, he worked on the receiving dock. Osborne participated in the UFCW campaign and was listed as a member of the UFCW organizing committee in the Union's July 23, 1996 letter to Respondent (R. Exh. 2). Osborne handed out literature and wore UFCW tee shirts and hats to work. He assisted counsels for UFCW and the General Counsel at a NLRB hearing in February or March 1997 and he acted as UFCW observer during the NLRB election.

Supervisor Jim Phipps issued a verbal warning to Eugene Osborne for a misshipment (R. Exh. 34) on January 20, 1997. The General Counsel does not contest that Osborne had a misshipment. Previously Osborne had been warned for misshipments in 1986, 1987, 1989, 1993, and 1994.

Osborne heard about misshipments around once each month and employees were not always disciplined for misshipments. Employees Tim Salyers, Bobby Collins, Craig Price, and Charlie Chapman had misshipments and were not disciplined.

Respondent offered evidence that Price, Collins, and Chapman did receive warnings. Price received warnings and was ultimately terminated for misshipments (R. Exhs. 42, 43). Chapman was given a verbal warning on August 29, 1986 (R. Exh. 46) and Bobby Collins received a verbal on May 12, 1986 (R. Exh. 47). Alvin Olinger testified that Salyers should not have received a warning. Instead that misload was the responsibility of Larry Nunley and Nunley received the warning.¹² Olinger testified that company supporter Bernie Gobble received a notation for two misloaded pallets on September 1, 1995 (R. Exh. 48).

As shown above, Bobby Collins testified that he never did anything to show that he supported the union. He testified about his responsibility for two misloads in 1996. In early 1996, Alvin Olinger told Collins that Collins had a misload. Collins was

not disciplined. He was told that he had a second misload later that year. That was about six months after his first misload. Collins talked to first Alvin Olinger then Buddy Honaker but was not disciplined for that occurrence.

Jim Phipps denied that he said to Eugene Osborne "if you don't have a misshipment every so often you're not working hard enough." Phipps admitted that Osborne did tell Phipps that another supervisor (probably Mark Hartzog) had made that statement to Osborne.

Findings

Credibility

Bobby Collins impressed me as a truthful witness in view of his demeanor and the full record. I credit his testimony. As to Eugene Osborne, I observed nothing, which caused me to doubt his testimony. However, I am convinced in view of documentary records to the contrary that Osborne was wrong in his testimony that Respondent did not discipline other employees including Bobby Collins, Craig Price, and Charlie Chapman because of misshipments. As to the conflict between Osborne and Phipps, in view of his testimony and demeanor, I am not convinced that Phipps was truthful. As to that matter I credit Osborne.

Conclusions

I first consider whether the Respondent acted out of anti-union animus in warning Osborne. *Manno Electric*, 321 NLRB 1 fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enf'd, 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

As in all the above cases, the record established Respondent's animus towards unions and it showed that Osborne was disciplined during the time he was engaged in union activity.¹³ The primary question is did Respondent treat Osborne in a discriminatory manner because of his activity on behalf of UFCW. As shown above several of the employees were noted for misshipments. A note was made about Bernie Gobble misloading two pallets on September 1, 1995. Osborne was previously noted for misshipments in 1986, 1989, 1991, 1993, and 1994.

After the UFCW filed charges on March 13, 1997, alleging the disciplinary actions against Osborne and Nunley were unlawful, Respondent disciplined and finally discharged Craig Price. Price was given a written warning on April 9, 1997, because he misshipped 45 cases of product. The written warning noted that Price had received a verbal warning for misshipment on March 14, 1997. Price was discharged on May 16, 1997, because he misshipped a pallet of goods to store 685 that should have gone to store 686, and a cigarette and tobacco order to store 610 that should have gone to store 40; and he failed to ship a pallet of repack product to store 632.

Osborne's alleged illegal disciplinary action was a January 20, 1997, verbal warning for "misshipment of two pallets of specials for store # 827, Eugene shipped to store # 678."

¹² As shown above, I found that Respondent engaged in unfair labor practices by warning Nunley.

¹³ However, the record showed that Osborne did not act as representatives for either the Union or NLRB in hearings and the election, until after his January 1997 warning.

As shown above, Respondent was not consistent in its practice of disciplining employees for misshipments. Occasionally, as in the case of Bobby Collins, employees were not disciplined for misshipments. However, in numerous other occasions including a September 9, 1994 written warning to Osborne, employees were warned and even discharged for that infraction. Under those circumstances I find that the General Counsel failed to show that Respondent treated Osborne in a discriminatory fashion. In making that determination I note that nothing was shown in the way of noticeable union activity by Osborne after the summer until after he received his January verbal warning. His assistance at a NLRB hearings and election did not occur until after the verbal warning, in February and March 1997. I find that the General Counsel failed to prove that Osborne was treated in a disparate manner because of his Union activity.

The 8(a)(4) and (3) Allegations; Unexcused Absence;
Steve Warner

Steve Warner works for Respondent as an order selector. Warner was subpoenaed and appeared at a NLRB hearing on February 10. He testified on February 13 and 14, 1997. Warner phoned Respondent and was permitted absences on Tuesday and Wednesday of that week. When he phoned in on Thursday, he was told he would have to talk to a supervisor. Supervisor Jim Phipps told Warner that he would get an unexcused absence because he had not called in within the 30-minute time frame. Warner told Phipps that they knew he had been subpoenaed to be in court and that he was calling in as a courtesy to Respondent. Warner hung up. When he phoned in the next morning he talked with Phipps again. Phipps asked which supervisor had Warner given his subpoena to and Warner replied that he had not brought the subpoena in yet but that he would do so the next day. Phipps replied okay. Warner did bring in the subpoena two days later and gave it to Phipps. However, he has never been advised that the unexcused absence for that Thursday was removed from his record.

Jim Phipps, supervisor (team leader), testified that Steve Warner phoned in and said that he had to testify at a NLRB hearing and would not be at work. Warner was scheduled to report at 6:30 a.m. and did not call in until 7:02 a.m. Phipps told Warner that he was supposed to call within 30 minutes of his starting time and this would have to be an unexcused absence. When Buddy Honaker came in around 8 a.m., Honaker and Phipps decided to give Warner an excused absence (R. Exh. 15). The decision was based on the fact that Warner's call was within 2 minutes of the required 30-minute deadline.

Findings

Credibility

The facts regarding this allegation are not in dispute.¹⁴ Although Phipps told Warner that he would receive an unexcused absence, the absence was actually excused.

¹⁴ Respondent brought out that Warner testified in the prior hearing that he would have signed anything when he signed his affidavit. Despite that fact there was no contrary evidence showing that Warner was not told he would receive an unexcused absence. Supervisor Phipps corroborated that testimony.

Conclusions

The evidence shows that Respondent did not issue an unexcused warning to Steve Warner. Instead he was told he would receive an unexcused warning. Respondent did not tell Warner that it had decided against issuing the unexcused warning. General Counsel argued that action amounted to the issuance of a verbal unexcused absence.

The test in determining an unexcused absence allegation is the same as that of a discharge.¹⁵ I shall consider whether the record showed that the Respondent acted out of antiunion animus. *Manno Electric*, supra; *Wright Line*, supra; *NLRB v. Transportation Management Corp.*, supra.

The record established that Warner called in within the 30-minute timeframe specified in Respondent's handbook. He was placed on hold by the operator and did not talk to Supervisor Phipps until 10 minutes after he placed the call. The record also shows without dispute, that Warner was calling to notify Respondent that he would be absent to attend a NLRB hearing pursuant to a subpoena. I find that evidence shows that Phipps was motivated by Warner's presence at the NLRB hearing to tell Warner he was being awarded an unexcused absence. Respondent failed to show that it would have told Warner his absence was not excused in the absence of his presence at the NLRB hearing. Therefore, I find that Respondent engaged in violation of Section 8(a)(1) and (4) by telling Steve Warner that he would receive an unexcused absence.

Written Warnings; Coy Wolfe Jr.

Coy Wolfe worked at Respondent as a forklift driver, until September 22, 1997. Wolfe signed an authorization card, signed up for the UFCW organizing committee and wore UFCW T-shirts and hats at work.

After hearing that Daniel Hounshell was disciplined for not working overtime on December 19, Coy Wolfe wrote a statement in support of Hounshell. The parties stipulated that Wolfe's statement was turned over to Respondent pursuant to subpoena on February 13, 1997. On February 24, 1997, Coy Wolfe was written up for poor work performance. He was given the warning in a meeting with Jeff Mahoney and Tony Lewis. After giving him the warning, Tony Lewis told Wolfe not to take it personally. Wolfe asked Lewis if Lewis had come in at any time during the week and not found Wolfe working. Lewis replied, "[N]o, every time I come in there, you was doing your job."

Assistant Warehouse Manager Jeff Mahoney testified that Coy Wolfe was given a written warning in February 1997 for having a tremendous number of outs (R. Exh. 20). Wolfe had been working in the repack area for a week. David Leland a supervisor, explained that "out" is basically a picking slot that has no merchandise in it—no quantity on hand. When Leland came to work on February 22, 1997, there were excessive outs. However, there was in-bound stock still there from the day before. The repack motor man for that week had been Coy Wolfe. Wolfe was not assigned to work on February 22. Leland

¹⁵ There is no dispute but that unexcused absences may result in disciplinary action while excused absences may not.

testified that Wolfe had not asked for help during that week (see R. Exh. 21).

Tony Lewis testified that he was told about outs on February 22 when he came to work on Monday February 24, 1997. He and Jeff Mahoney investigated the matter and awarded Wolfe a warning (R. Exh. 20). Lewis denied telling Wolfe that Wolfe was doing what he was supposed to every time Lewis had seen him.

Assistant Warehouse Manager for Systems Paul Widener was a team leader in the shipping department in the dry warehouse in February 1997. He and Robbie Moretz were walking through the repack area before the 9 a.m. break on Saturday morning. Order selector Tommy Owens expressed some complaints about the slots. Widener and Moretz checked and discovered that a great number of the selection locations were either empty or at a very low level. He testified there were several dozen empty slots. Widener was told to document what he had observed. It required the largest part of that Saturday for a motor man (forklift operator) to replenish that repack area. Widener testified that it is the responsibility of the lift operator to monitor the selector locations and to replenish them in a timely manner.

Dry Warehouse Manager Buddy Honaker came in one Saturday morning and was told by Bernie Gobble of a problem with outs. Honaker asked Robbie Moretz to determine what was going on. Honaker walked through aisles 6, 7, 8, and 9 and found slots that were empty. According to Honaker Wolfe should have filled the slots to carry over through that weekend.

Forklift operator Bernie Gobble testified that whenever he restocks a particular aisle he notices whether involved selection slots are out. He does not go through the aisles and check to see if other slots are out. He asked the supervisors for help on a Saturday in February 1997, because there seemed to be a large number of outs. It had been around 6 months before that time since Gobble had last seen as many outs as existed on that Saturday. Gobble testified that an order selector is not required to notify a forklift operator of a slot problem unless there is an actual out.

Forklift operator Gary Singleton told Buddy Honaker that he did not have a large number of outs on February 22, 1997. Singleton had an unusually large order on that day. The order involved filling 878 case orders and Singleton had less than 10 outs. Singleton testified that was not a large number of outs considering the size of the order.

Findings

Credibility

It was undisputed that Wolfe was a UFCW supporter; that he gave a statement in support of Daniel Hounshell; that statement was turned over to Respondent on February 13; and that Wolfe was written up for poor work on February 24. There was a dispute as to whether Tony Lewis told Wolfe that every time he had seen Wolfe, Wolfe was doing his job. I have considered that testimony in light of their demeanor and the full record and I am convinced that Wolfe was truthful. I credit his testimony as shown herein. I also credit Gary Singleton. Singleton is cur-

rently employed by Respondent and has worked there for over 9 years.¹⁶

Conclusions

I shall consider whether the record showed that the Respondent acted out of antiunion animus. *Manno Electric*, supra; *Wright Line*, supra; *NLRB v. Transportation Management Corp.*, supra.

As shown here, I have found that Respondent demonstrated animus on numerous occasions. In view of those findings and the full record I am convinced that Respondent was motivated to warn Wolfe because of his submission of a statement in support of Daniel Hounshell's unfair labor practice allegations. I base those findings in part on the timing of the action against Wolfe, coming just 11 days after his statement was given to Respondent and on comments by Supervisor Tony Lewis during the disciplinary interview. Lewis told Wolfe that he should not take the warning personally and that he had not seen Wolfe at any time when Wolfe was not working. It is also revealing that Wolfe consulted with Lewis regarding outs during the week of February 22 because he was receiving an unusual amount of receiving. Wolfe complained that the night shift should assist in handling the heavy workload. During the disciplinary interview Wolfe pointed out that Lewis could explain the problems that week and Lewis admitted difficulty with the night shift properly placing McCormick products. Additionally, the action against Wolfe occurred during the period of time when Respondent was very active in unfair labor practice activity.

Respondent offered evidence showing a large number of outs were discovered on Saturday, February 22 and that Coy Wolfe had worked as repack motor man during the week before that date. However, Respondent failed to show why it had not taken similar action when a similar problem existed 6 months earlier. Its own witness, Bernie Gobble testified there had not been a similar problem in 6 months. Respondent also failed to show why no one else was disciplined for the February 22 problem. After Coy Wolfe finished work on Friday the night shift came on and was followed by Bernie Gobble on Saturday morning. None of those people were disciplined.

Moreover, I have credited evidence showing that Coy Wolfe was involved with an extensive amount of inbound stock throughout the week before February 22. Respondent failed to show that it considered or investigated that matter in determining to warn Wolfe.

Therefore, I am convinced that Respondent failed to show that it would have disciplined Wolfe in the absence of his activity on behalf of Daniel Hounshell. Even if I credit that there was a large number of outs of Saturday, February 22, there is no showing in the record that Wolfe failed to perform well during that prior week. The evidence showed that Coy Wolfe was reassigned to the repack area only at the beginning of the week before February 22. Respondent failed to credibly rebut Wolfe's testimony that he was busy with an unusual large amount of receiving that week.

¹⁶ Singleton was led to testify regarding February 27, 1996. After reviewing his prehearing affidavit he corrected the date to be February 22, 1997.

In view of the full record I am convinced that Respondent engaged in a pretext in order to justify its disciplinary action against Wolfe. *Wright Line*, supra; *Waste Steam Management*, 315 NLRB 1088 (1994); *Harmony Corp.*, 301 NLRB 578 (1991). Although Respondent contended there were a large number of outs on February 22, that was credibly disputed by Forklift operator Gary Singleton. Singleton testified that he had 10 outs and that was not a large number considering the size of the order. Moreover, the full record showed that Respondent failed to investigate whether Wolfe had actually failed to perform his work during the week before February 22. I find that Respondent failed to show that it would have warned Coy Wolfe in the absence of his activity on behalf of the unfair labor practice charges involving Daniel Hounshell. Respondent engaged in a violation of Section 8(a)(1), (3), and (4) of the Act by warning Wolfe.

CONCLUSIONS OF LAW

1. Mid-Mountain Foods, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food and Commercial Workers International Union, Local 400, AFL-CIO, CLC and International Brotherhood of Teamsters, AFL-CIO are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent by threatening its employees with termination and that others will be terminated because of the Union; and by threatening employees with the futility of selecting the Union; in an effort to discourage union activity, engaged in conduct in violation of Section 8(a)(1) of the Act.

4. Respondent by suspending and terminating John Widener; terminating Randall Perdue; by issuing a written warning, suspending and discharging Tony Orfield; by terminating Ronnie Brooks; and by issuing written warnings to Daniel Hounshell and Larry Nunley because of their union activities, engaged in conduct in violation of Section 8(a)(1) and (3) of the Act.

5. Respondent by verbally awarding an unexcused absence to Steve Warner; and by issuing a written warning to Coy Wolfe Jr. because of their participation in concerted, union, and NLRB proceedings, engaged in conduct in violation of Section 8(a)(1), (3), and/or (4) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6), (7), and (8) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent has illegally suspended and discharged John Widener, illegally discharged Randall Perdue, illegally warned, suspended, and discharged Tony Orfield and illegally discharged Ronnie Brooks in violation of sections of the Act, I shall order Respondent to offer those employees immediate and full employment to their former positions or, if those positions no longer exist, to substantially equivalent

positions. I further order Respondent to make those employees whole for any loss of earnings suffered as a result of the discrimination against them. Backpay shall be computed as described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁷

ORDER

The Respondent, Mid-Mountain Foods, Inc., Abingdon, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with discharge and the discharge of others because of their union activities.

(b) Threatening its employees with the futility of selecting the union.

(c) Issuing unexcused absences, verbal and written warnings, suspending and discharging its employees in order to discourage its employees from engaging in union activities or because its employees participate in NLRB proceedings.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order, offer immediate and full employment to John Widener, Randall Perdue, Tony Orfield, and Ronnie Brooks to their former positions or if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them plus interest, in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful unexcused absence, verbal and written warnings, suspensions, and discharges of John Widener, Randall Perdue, Tony Orfield, Ronnie Brooks, Daniel Hounshell, Larry Nunley, Steve Warner, and Coy Wolfe Jr., and within 3 days thereafter notify those employees in writing that this has been done and that the warnings and discharges will not be used against any of them in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, and timecards, personnel records, reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Abingdon, Virginia, copies of the attached notice.¹⁸

¹⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the Na-

Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to

tional Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 21 days after service by the Region, file with the Regional Director, Region 11, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.